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THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE: JURISDICTION OF THE ENGLISH COURTS AND RECOGNITION OF FOREIGN DECREES

THE recommendations of the Royal Commission on Marriage and Divorce on the basis of matrimonial jurisdiction and the recognition of the jurisdiction of other countries (contained in Part XII of the Report [1]) have not yet been the subject of a commentary in this *Review* [2]; and the grant of a second reading in the House of Lords to a Bill designed to implement those recommendations [3] provides a convenient occasion for this article.

Part XII of the Report was founded on the work of a committee consisting of two lawyer members of the Commission (Lord Keith of Avonholm and Mr. Justice Pearce) and Dr. Cheshire who was co-opted to the committee. The recommendations are reproduced in the form of a code as an appendix to the Report,[4] and fall into two sections: jurisdiction of the English [5] courts and recognition of foreign decrees. Each of those sections may be subdivided into portions dealing with divorce and nullity. It is proposed to follow the Commission's order of examination, and to make some observations on the more important and controversial recommendations.

1 Cmd. 9678.

2 See, however, Grodecki, " Recent Developments in Nullity Jurisdiction " (1957) 20 M.L.R. 566, where the Commission's proposals in respect of nullity jurisdiction are considered in relation to some of the recent case law. For commentaries upon other sections of the Report, see: Kahn-Freund (1956) 19 M.L.R. 573 (generally); Stone (1956) 19 M.L.R. 601 (children, maintenance and aliment).

3 Hansard, Vol. 204, cols. 435 *et seq.* (H.L. June 27, 1957.) The Bill (entitled the Matrimonial Causes Jurisdiction Bill) was welcomed in substance by all those who spoke in the debate, but the draftsmanship was subject to severe criticism.

4 Appendix IV.

5 The recommendations are (with minor exceptions) expressed as being equally applicable to Scotland.

Jurisdiction of the English Courts in Divorce

The Commission found that the principal source of hardship under the existing law is the "limping marriage," *i.e.*, a "marriage which is regarded in one country as dissolved [or annulled] but in another country as still in being" [6] by reason of the latter's refusal to recognise a decree pronounced or recognised by the former. The embarrassments and uncertainties suffered by the parties to such marriages must unquestionably influence any attempt to reformulate the bases upon which the English courts exercise their matrimonial jurisdiction. The Commission have attempted a comprehensive reformulation, and their detailed recommendations are expressed to proceed upon the premise "that the provision of facilities for obtaining a divorce should be limited to persons who are in some way connected with England." [7] The reason for this premise follows immediately: "We doubt whether any large measure of recognition would be given by other countries to the exercise of a jurisdiction in divorce based upon any other principle." [8] This reason involves an acknowledgment that foreign countries recognise decrees by reason of the spouses' association with the law district wherein the decree is pronounced rather than by reason of the decree's conformity with what is conceived as being an appropriate system of law. Accordingly, the Commission rejected [9] a suggestion that the court's matrimonial jurisdiction should be unrestricted but that a decree should only be granted on a ground substantially similar to one recognised by the parties' personal law.

The Commission recommend that the court should have jurisdiction to pronounce a decree in four circumstances. The first of these is where the petitioner is domiciled in England.[10] In itself, this is a restatement of the existing rule, but it is coupled with an endorsement of the majority views in the Private International Law Committee's Report on Reform of the Law of Domicile,[11] and with a recommendation that a wife who is living separate and apart from her husband should be enabled to acquire an independent domicile for the purpose of invoking the court's matrimonial jurisdiction.[12] The Report of the Private International Law Committee has been discussed elsewhere,[13] and it would be superfluous to attempt adding anything to what is there said. The suggestion that a wife living "separate and apart" (presumably these words indicate that the

[6] Para. 789.
[7] Para. 814.
[8] *Ibid.* This is of quite fundamental importance, and we are entitled to assume that the Commission made some investigation of the bases upon which other countries recognise divorce decrees.
[9] See paras. 802 and 814.
[10] Para. 815.
[11] Cmd. 9068.
[12] Paras. 818 and 825. This recommendation also applies in connection with jurisdiction to annul a voidable marriage, para. 894.
[13] Graveson, "Reform of the Law of Domicile" (1954) 70 L.Q.R. 492.

marriage subsists only in name) should be entitled to acquire her own domicile for the limited [14] purpose mentioned, was not in terms discussed by the Private International Law Committee, although they dismissed a proposal that a wife should be able to acquire a separate domicile for "certain limited purposes" because of the difficulty involved in defining those purposes.[15] The Commission has now defined one such purpose, and their object in so doing was to meet the hardship which arises in the case of a woman resident but not domiciled in England.[16] At present these cases are met by section 18 (1) (*b*) of the Matrimonial Causes Act, 1950,[17] but the Commission considered that the relief is unsatisfactory because of the improbability of a decree based on "ordinary residence" for three years and pronounced without regard to the "personal law" [18] being recognised abroad.[19] The Commission may have been satisfied that foreign countries do not, in general, recognise a jurisdiction based upon the residence of the petitioner alone; but the suggestion that disregard of the "personal law" is critical seems inconsistent with their acknowledgment that conformity to an appropriate legal system is immaterial if the parties' association with the law district wherein the decree is pronounced is only a tenuous one. However, the Commission felt that a decree pronounced on the basis of the wife's domicile would carry a better chance of recognition (at least in countries which allow a wife to acquire a separate domicile) than one based on her ordinary residence for three years.[20] "Ordinary residence" is equivalent to "home" [21]; and the Private International Law Committee recommended that a person should be presumed to be domiciled where he has his "home." [22] This recommendation was amongst those endorsed by the Commission. Since one can acquire a "home" in less than three years it is apparent on the basis of the Commission's recommendations that decrees could be granted in cases where the petitioner's association with England is less substantial than it is at

[14] The Commission accepted the existing rule that a wife's domicile follows that of her husband, but the rule is now to be explained as one of convenience rather than subservience. Paras. 820–821.

[15] Cmd. 9068, para. 17 (iii).

[16] Para. 822.

[17] s. 18 (1) (*a*) serves a more restricted class of woman who may also be resident but not domiciled in England. The Commission did not discuss this paragraph, and such inquiries as the writer has been able to make show that it is not apparently of great practical importance.

[18] The meaning of this phrase as used by the Commission is explained hereinafter. At present it must be sufficient to say that it means either the *lex domicilii* or the *lex patriae* of the *propositus*.

[19] Para., 822. See *Fenton* v. *Fenton* [1957] V.L.R. 17.

[20] Para. 824. In the special cases which are brought under s. 18 (1) (*a*) of the 1950 Act the association with England will normally be less than ordinary residence for three years.

[21] See *Stransky* v. *Stransky* [1954] P. 428. Compare *Hopkins* v. *Hopkins* [1951] P. 116.

[22] Cmd. 9068, para. 15, rule 1.

present. This becomes even clearer when another of the Commission's recommendations is considered. They suggest that the burden of proving the acquisition of a separate domicile should be upon the wife, but that she should be deemed (in the absence of evidence to the contrary) to be domiciled in England if she was so domiciled either immediately before her marriage or immediately before the separation from her husband and is resident in England at the commencement of proceedings.[23] These presumptions cannot readily be reconciled with the ones proposed by the Private International Law Committee,[24] and we must suppose that where they are applicable those of the Commission are to take precedence and may be rebutted by evidence as to the petitioner's "home."

Unless it be imagined foreign courts regard an assertion of jurisdiction by reason of domicile as being *per se* conclusive, it is hard to believe that decrees pronounced on the basis of the presumptions which have been mentioned will achieve any greater measure of success than those pronounced under section 18 of the Matrimonial Causes Act on the basis of three years' ordinary residence. They may in some cases achieve considerably less, the more especially as the atmosphere of an undefended divorce suit is not one in which presumptions are likely to be rebutted with any frequency. Unless they are victims of formalism, countries which are prepared to recognise decrees pronounced by a court of the wife's domicile please themselves as to what is meant by "domicile," and their pleasure is affected neither by reason of the decree having been based upon a three years' residence if they consider the wife to have been domiciled in the law district in question, nor by the ground on which jurisdiction was in fact claimed.[25] In these circumstances it is tempting to regard the bestowal of a separate domicile upon the wife as a concession to formalism, particularly as the Commission did not suggest that the 1950 Act failed to provide relief for any class of woman who might reasonably expect to receive it. There appears to be little merit in altering the existing and simple rule in favour of one based on a complex of presumptions which could increase the number of limping marriages. This would have been an untenable submission had the Commission been able to rely upon evidence that the present rule is too restrictive. That, however, they were apparently not able to do.

The second and third circumstances in which it is recommended the court should possess divorce jurisdiction may be conveniently discussed together under the heading of "residence." As we have seen, the Commission stigmatised the present residence jurisdiction because thereunder the courts pay no regard to the parties' personal

[23] Para. 825.

[24] Cmd. 9068, para. 15. (The principal presumption is that a person should be presumed to be domiciled where his home is.)

[25] Compare the approach in *Robinson-Scott* v. *Robinson-Scott* [1957] 3 W.L.R. 842.

law. The Commission considered that a jurisdiction based upon residence but exercisable only with due regard to the personal law "will receive wide recognition."[26] Accordingly, they propose the court should have jurisdiction when both parties are resident in England at the commencement of proceedings, and when the petitioner is "in" England at the commencement of proceedings if the parties last resided together in England.[27] In neither circumstance, however, would the court pronounce a decree unless the personal law or laws of the spouses:

> "recognise as sufficient ground for a divorce or nullity of marriage a ground substantially similar to that on which a divorce is sought in England, or the personal law or laws of both parties would in the circumstances of the case permit the petitioner to obtain a divorce on some other ground."[28]

These proposals are far more startling and revolutionary than seems to be warranted by their "real purpose," *viz.*, to "assist those persons who have to make a home in England . . . for some time . . . but who have no intention of becoming domiciled here."[29]

The Commission believed that the role assigned to the personal law made it unnecessary to insist on a minimum period of residence.[30] "Residence" as a criterion of matrimonial jurisdiction is readily satisfied (*a fortiori* being "in" England),[31] and hence the Commission's reason for dispensing with a minimum qualification is nearly inconsistent with their earlier dismissal of the proposal that jurisdiction should be unrestricted subject to observance of the personal law. It is also hard to reconcile with the reason on which that dismissal appears to have been justified, *viz.*, that countries recognise foreign decrees by reason of the spouses' association with the law district wherein the decree is pronounced rather than by reason of the decree's conformity with what is conceived as being an appropriate system of law. At all events the Commission's proposals involve a risk of England becoming an object of pilgrimage by unhappily married couples. The possibility was not regarded as a serious one for "there would be little point in coming specially to England . . . in order to obtain a decree which could be given by the court of one's own country."[32] There are at least two excellent reasons. First, "one's own country" may not be the country from which one has come. Secondly, English ancillary relief may be far more favourable than in "one's own country."

[26] Para. 828.
[27] Para. 831.
[28] App. IV, para. 1, proviso.
[29] Para. 832.
[30] Para. 830.
[31] See: *Matalon* v. *Matalon* [1952] P. 233 (C.A.). Grodecki (1957) 20 M.L.R. 566, 580, considers that the Commission envisage "residence" as meaning no more than "mere physical sojourn."
[32] Para. 832. The Commission recommend that there be an amendment to the Legal Aid Regulations in order to deprive mere pilgrims of any right to assistance.

Apart from the difficulty relating to recognition, the Commission thought section 18 of the Matrimonial Causes Act, 1950, to be defective in that thereunder a husband may be compelled to come to England if he wishes to defend his status notwithstanding that he has no previous connection with this country.[33] Apparently it was only for this reason that the residence of the petitioner alone was not suggested as the basis of jurisdiction. There is some difficulty in believing that this consideration weighed heavily with the Commission, for it is nowhere mentioned in their discussion of jurisdiction based upon a wife's separate domicile, yet it is expressed as standing between them and a complete abdication of any principle based upon the parties' association with the forum.[34]

The Commission endorses the present inability of the court to grant a divorce decree on a ground unknown to English law. Accordingly, in all cases the petitioner would have to prove himself entitled to a decree under English law. The effect of the Commission's proposals in respect of the personal law is that where the court's jurisdiction is invoked on the ground of a residence qualification the petitioner may in addition have to prove himself entitled to a decree under either one or two foreign laws. (The possibility of having to satisfy a second arises because the Commission felt that, where the personal laws of the spouses are different, to disregard one would tend to increase the number of limping marriages.[35]) At least he will have to show that his personal law (and his wife's if it be different) recognises a ground of divorce "substantially" similar to that on which he is proceeding in England. The prospect before the petitioner, his advisers and ultimately the court, is not an attractive one. They can take some comfort from the recommendation that in matrimonial proceedings the court should be enabled to accept as evidence of foreign law an "official certificate given by a competent authority of the country concerned."[36] The utility of this recommendation is patently slight, and almost deserves the epithet "a sop for Cerberus."[37] The type of problem which resort to the personal law (or laws) could create may be simply illustrated. Let it be supposed a husband desires to petition on the ground of desertion, and that the parties' respective personal laws are Arcadian and Illyrian. Neither of those legal systems has a ground of divorce known as "desertion," but one knows of "wilful

[33] Para. 830.

[34] *Ibid.*

[35] Para. 835. The Commission remark that the personal laws may be different where the personal law is the law of the spouses' nationality or "where the wife has acquired a separate domicile." It is difficult to see how the second alternative can arise where jurisdiction is invoked on a residence basis since the wife's separate domicile is only material to an assertion of jurisdiction based thereon.

[36] Para. 916.

[37] See Grodecki (1957) 20 M.L.R. 566, 583–585, where this recommendation and the Commission's confidence in the application of foreign laws are subject to criticism.

separation " whilst the other knows of " incompatibility of temperament." Assuming that the petitioner's case could be substantiated under English law it must first be decided whether " wilful separation " and " incompatibility of temperament " are " substantially " similar to desertion in English law. If the answer to that question be no, it must further be decided whether the petitioner would, in fact, be granted a decree in the Arcadian courts on the ground of " wilful separation," and in the Illyrian courts on the ground of " incompatibility of temperament." [38] If inquiries of this nature are to be inflicted upon litigants, the courts and the profession, it should be only for the most compelling reasons. As we have seen, the only reason given by the Commission appears to be inconsistent with their own premises. One may ask whether the case against basing jurisdiction solely upon the petitioner's ordinary residence for (say) three years is so devastatingly conclusive as to justify such complexity.

So far we have not mentioned the sense in which the Commission used the phrase " personal law." They accepted that in the first instance it should mean the law of the party's domicile.[39] " If that law recognises that questions of personal status are governed by the law of the country in which a person is domiciled, then the court should look no further but should regard the domestic law of that country as the personal law of the spouse." [40] (No mention is made of the possibility that the connecting factor, " domicile," may be defined by the *lex domicilii* in a sense different from that in which it is used in English law.[41]) If, however, the *lex domicilii* refers questions of personal status to the *lex patriae*, and the *lex patriae* regards such questions as governed by the law of a person's nationality, then it is recommended that that system should govern.[42] This is apparently a partial *renvoi* and the only inherent difficulty to which attention need be drawn is that of discovering the national law of a person whose nationality is that of a State with several law districts (*e.g.*, a citizen of the United Kingdom and Colonies or an American citizen).[43] The problem of ascertaining the personal law becomes more involved when the law of the nationality refers questions of personal status to the law of the domicile. Of this the Commission said: " This introduces the difficult problem of *renvoi*, to which the courts of England . . . have not as yet provided

[38] It does not appear whether English rules of procedure are envisaged as applying to these inquiries.

[39] Para. 837.

[40] *Ibid.*

[41] As in *Re Annesley* [1926] Ch. 692.

[42] Para. 837. Rules are provided for determining a person's nationality (see para. 838). These rules may indicate a legal system other than that which would be applied by the *lex domicilii*.

[43] The national law of a " British " subject has, in the past, been assumed to be English law, see: Falconbridge, *Essays in the Conflict of Laws* (2nd ed.), pp. 199–216.

an altogether satisfactory solution." [44] The Commission again see the problem as one of partial *renvoi*, and aware that there is no logical answer to the *circulus inextricabilis* suggest that the internal law of the domicile should govern.[45] They point out that their suggestion accords with the provisions of the Hague Convention to Regulate Conflicts between the Law of the Nationality and the Law of the Domicile to which the Private International Law Committee recommended the United Kingdom should become a party.[46] (In fact the Private International Law Committee was concerned with the problem of total *renvoi*, which must be taken as the current form in those branches of English law where the doctrine is known,[47] but this is not thought to make any material difference.) The use of *renvoi* in connection with matters of personal status introduces another complication and element of doubt into the task of advising would-be petitioners.

The fourth circumstance in which it is recommended the court should possess divorce jurisdiction is esoteric. The Commission considered that a jurisdiction based solely upon nationality (*i.e.*, citizenship of the United Kingdom and Colonies), although theoretically unobjectionable, would in practice lead to " confusion " since persons sharing that status may " belong in the sense of domicile " to any one of many law districts.[48] With this we may respectfully agree. However, the Commission were concerned that relief should not be withheld from " Englishmen " who are domiciled and resident in countries which either have no facilities for divorce or whose courts do not exercise jurisdiction on the basis of either domicile or residence.[49] One is tempted to ask whether the philosophy expressed in this concern is that facilities for divorce should be amongst the benefits bestowed on those who can in any way claim a connection with the welfare State. The connection which the Commission had in mind as being sufficient is not obvious. The character of " Englishman " when possessed by a person who is neither domiciled nor resident in England is one which is unknown to the law. For want of any other the Commission were forced to use the connecting factor of citizenship of the United Kingdom and Colonies,[50] but they appreciated the criticism that this factor " is indeterminate to associate [a person] with England, Scotland or any other country." [51] However, the criticism is tolerated in order to serve " Englishmen " whose circumstances of domicile and residence have been described. The service also benefits (for example) a matrimonially unhappy

[44] Para. 837. The Commission do not differentiate between partial and total *renvoi*.
[45] Para. 837.
[46] Cmd. 9068, para. 24.
[47] See: *Re Annesley* [1926] Ch. 692; *Re Ross* [1930] 1 Ch. 377; *Re Askew* [1930] 2 Ch. 259; *Re Duke of Wellington* [1947] Ch. 506.
[48] Para. 840.
[49] Para. 841. The countries specifically mentioned are Italy and Spain.
[50] Para. 842.
[51] Para. 843.

Maltese who is domiciled and resident in Italy. It is difficult to bring the Commission's proposals under this head within measurable distance of their principle "that the provisions of facilities for divorce should be limited to persons who are in some way connected with England."[52] The task would perhaps be easier if "Englishmen" were defined as persons possessing citizenship of the United Kingdom and Colonies who had a domicile of origin in England.[53] Yet it may be doubted whether even this would be sufficient association to ensure to decrees any measure of recognition abroad. The Commission were perhaps aware of their departure from principle, for they attempt to avoid the creation of limping marriages under this head of their proposals by limiting the grant of relief to those citizens of the United Kingdom and Colonies who are domiciled and resident in countries which not only cannot grant them relief but which refer questions of status to the national law of the *propositus*.[54] The limitation proceeds upon the dubious assumption that in the eyes of the *lex domicilii* the national law of a citizen of the United Kingdom and Colonies is English law.

Recognition of Foreign Divorce Decrees

In dealing with the recognition of foreign divorce decrees (whether obtained "judicially or otherwise"[55]) the Commission expressed themselves as being guided by two principles. First, that there should be reciprocity of treatment: "recognition should be given to a divorce which has been obtained in the exercise of a jurisdiction substantially similar to that exercised by the English courts."[56] Secondly, that due regard should be paid to the attitude of the personal law.[57] In accordance with these principles the Commission propounded three heads of recognition.

The Commission recommend the court should recognise a decree pronounced either in the exercise of a jurisdiction "based on" the domicile of either spouse at the date of proceedings, or in the exercise of a jurisdiction which would be recognised by the law of either party's domicile at that time.[58] It is further recommended (presumably in connection with the first alternative alone) that "the court should not require that the concept of domicile in the country

[52] Para. 814.
[53] *Cf. Re O'Keefe* [1940] Ch. 124; *Re Johnson* [1903] 1 Ch. 821.
[54] Para. 841.
[55] These words are explained in paras. 861–865, and are intended to cover religious and consensual divorces, and divorces effected by legislative or executive act. The effect of the recommendations is that such divorces will be treated as valid if they are pronounced under or recognised by the personal law of the spouses. It is recommended that the present rule whereunder a "Christian" marriage cannot be terminated in a "non-Christian" manner (see *Maher* v. *Maher* [1951] P. 342) should be ended. See, on this point, Cowen, "Divorce and the Domicile" (1952) 68 L.Q.R. 88.
[56] Para. 848.
[57] *Ibid.*
[58] Para. 849. The time factor in the latter alternative seems to be implicit.

in question should exactly correspond to the English concept." [59] The second alternative is a restatement of the existing rule [60] amended to take account of a wife's power to acquire an independent domicile.[61] As such it needs no special comment. The first alternative, besides taking account of a wife's power to acquire her own domicile, apparently embodies a substantial departure from the existing law. At present it is immaterial whether the foreign court in fact based its jurisdiction upon the domicile of the parties. Recognition depends on whether the parties are domiciled in the English sense of the term within the law district whose court pronounced the decree, and it is irrelevant upon what basis the foreign court claimed to exercise jurisdiction. This is a liberal and non-formalistic approach under which the court can recognise a decree granted upon, *e.g.*, an entirely unrestricted basis. The language used by the Commission seems to indicate a desire that in future conclusive emphasis should be given to the basis on which the foreign court claimed to exercise jurisdiction. Why else should they suggest that the concept of domicile as used by the foreign court need not correspond to English notions thereof? On the other hand, the Commission describe the recognition of a decree "based upon" domicile as being in accordance with the "existing" law,[62] and in their draft code they speak of recognising a decree "which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings." [63] What was really desired must be a matter of conjecture. Perhaps the fairest (and certainly the most desirable) interpretation is that a twofold approach was intended. First, the court will recognise a decree of a court of the domicile (in the English sense) regardless of the basis upon which it was in fact pronounced. That is the existing rule. Secondly, the court will recognise a decree pronounced on a basis of a jurisdiction substantially similar to that of domicile in the English sense. As an extension of the existing law this is to be welcomed, for the English concept of domicile is in some respects peculiar [64] and there is little virtue in refusing to recognise a decree based on a view of domicile akin to the English one on the ground that the two views do not exactly correspond.

The second head of recognition propounded by the Commission

[59] Para. 850.
[60] *Armitage* v. *Att.-Gen.* [1906] P. 135.
[61] It does not appear which legal system determines whether the wife had capacity to acquire an independent domicile. "Domicile" in an English court means domicile in the English sense, and the Commission's recommendation of a change in the English law is in terms confined to cases where a wife seeks to invoke the jurisdiction of the English court. Presumably it must be extended to cases where the wife seeks to procure recognition of a decree recognised by a court at her domicile.
[62] Para. 850 (i).
[63] App. IV, para. 7 (*a*).
[64] See Cmd. 9068, para. 31.

is that of nationality. It is recommended the court should recognise decrees pronounced by a court in the country of either spouse's nationality or which would be recognised by a court in such country.[65] This recommendation is entirely satisfactory for, as the Commission pointed out, nationality is a common basis of jurisdiction, and " to refuse recognition to a divorce obtained in such circumstances is to increase the number of ' limping marriages ' and to cause hardship to the persons affected." [66]

The third head of recognition is a residual one. It is recommended that " recognition should . . . be given to a divorce obtained . . . in circumstances substantially similar to those in which the English . . . courts exercise divorce jurisdiction in respect of persons who are not domiciled in England." [67] Apparently, the Commission do not envisage recognition of decrees pronounced on a different jurisdictional basis to that asserted in England but in circumstances in which an English court would *mutatis mutandis* have assumed jurisdiction.[68] This is unduly formalistic. As with domicile, a substantial similarity in the formal basis of jurisdiction should be an alternative basis of recognition but it should not be an exclusive one.

The Commission's views on " substantial similarity " are not easy to understand. They did not " think it necessary to insist that, in granting the divorce, the court . . . should have had regard to the personal law of the spouses, so long as the divorce would in fact be recognised as valid by the personal law." [69] We have seen that under the heads of domicile and nationality the Commission recommend that decrees recognised by either the *lex domicilii* or the *lex patriae* should be recognised in England. In such cases it is unnecessary to inquire as to the jurisdictional basis on which the decree was pronounced. Accordingly, the Commission's refusal to insist on regard for the personal law when the foreign court's jurisdiction is sought to be upheld on a ground other than domicile or nationality appears to be devoid of any effective meaning. The word "appears " is used because, apart from regard for the personal law, the jurisdiction of the English courts on a residence qualification is recommended to depend only on the common residence of the parties, or, in cases where the last matrimonial home was in England, upon the presence of the petitioner alone, and the Commission can hardly have intended that English courts should recognise foreign decrees pronounced after (say) three weeks' common residence in a hotel and without more. Presumably, therefore (and despite what they said), the Commission envisaged foreign decrees as being

[65] Para. 857.
[66] Para. 856.
[67] Para. 851.
[68] See *Robinson-Scott* v. *Robinson-Scott* [1957] 3 W.L.R. 842.
[69] Para. 852 (i). There are detailed recommendations dealing with the time at which the similarity must exist (paras. 853–855).

recognised on the ground of "substantial similarity" only when they have been granted with "regard to the personal law."[70] The latter is an imprecise phrase, and the Commission skirt the difficulties by saying "a great deal must be left to the discretion and good sense of the court which has to consider any question involving the recognition of a divorce decree."[71] Amongst the questions which are so left are the determination of what is meant by the words "personal law" (*i.e.*, must it be the law to which an English court would have looked?) and the words "have had regard to" (*i.e.*, is it sufficient that the foreign court should have satisfied itself that, *e.g.*, cruelty is a ground of divorce under the personal law, or must it have satisfied itself that a decree would in fact have been granted under the personal law?). These are matters on which it would be hard to advise with confidence. They arise from attempting to postulate reciprocity in connection with the wide and complicated residential basis of jurisdiction which it is recommended should be given to the English courts.

Jurisdiction of the English Courts in Nullity

Although the portion of the Report dealing with jurisdiction in nullity proceedings rests on the distinction between void and voidable marriages, the Commission do not in terms deal with the critical problem of how to determine whether a marriage is void or voidable. Under the existing law the position is obscure, but apparently any defect relating to either capacity (*e.g.*, consanguinity, prior marriage and nonage) or form is treated as rendering a marriage void since that is its effect in English domestic law.[72] Other types of defect are (*semble*) tested against the law of the husband's domicile at the time of marriage.[73] The disregard of foreign law in favour of the categories of English law cannot be regarded with enthusiasm since that category of void marriages is wider in England than it is abroad.[74] However, since the personal laws of the parties may differ as to the category into which the marriage is to be placed it would seem impossible to devise any more satisfactory solution. At present neither the problem nor the solution is of great practical importance because with one exception the grounds on which jurisdiction is exercisable are the same whether a marriage is alleged to be void or voidable.[75] As will be seen, the Commission propose to end this similarity, and in consequence it is regrettable that they

[70] This is seemingly confirmed by note 20 on p. 225.

[71] *Ibid.*

[72] There is no reported case known to the writer in which the court has failed to make this assumption, although, of course, it is always appreciated that selection of the *lex causae* depends upon the nature of the defect alleged.

[73] *De Reneville* v. *De Reneville* [1948] P. 100 (C.A.).

[74] See Cohn, "Nullity of Marriage" (1948) 64 L.Q.R. 324, 337.

[75] See *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115 (C.A.), and generally Grodecki (1957) 20 M.L.R. 566.

did not devote any attention to the preliminary question of how to characterise a marriage.

Since " in its effect on the personal status of the spouses the annulment of a voidable marriage has the same effect as the dissolution of a valid marriage," [76] the Commission recommend that the basis of jurisdiction in respect of voidable marriages should be materially similar to those suggested in connection with divorce (*viz.*, domicile of either party at commencement of proceedings, common residence at commencement of proceedings, and, where the last matrimonial residence was in England, the presence of the petitioner [77]). The observations which have already been made on the suggested bases of divorce jurisdiction are equally applicable in the present context.[78] The assimilation of voidable marriages and marriages subject to dissolution is to be welcomed for the reason given by the Commission. Despite theory and formation the two are, in practice, indistinguishable.

The Commission's recommendations concerning choice of law in proceedings to annul a voidable marriage proceed upon the assumption (already referred to) that a defect relating to form or capacity can ever only render a marriage void. Thus, it was regarded as " fundamental that the court, in determining the issues, should look to the personal law of the spouses as well as to English . . . domestic law." [79] The personal law is envisaged as being the personal law of either spouse at the time of marriage.[80] The choice of system and time is justified because the Commission found that the grounds of voidability are in general dependent on the petitioner being unaware at the time of marriage of certain facts which were deemed material by his then personal law.[81] It is not clear why a petitioner whose marriage is valid by his ante-nuptial personal law should be entitled to rely on a ground of avoidance given by the respondent's ante-nuptial personal law let alone English domestic law. For the petitioner (on the Commission's argument) must have known of all the facts which his personal law considered it material for him to know for his own protection. However, the Commission thought that it would not be " just " if a petitioner could not rely on facts which were immaterial under his personal law.

The Commission recommend the court should have jurisdiction to declare a marriage void if the petitioner is either domiciled or present in England at the commencement of proceedings.[82] The

[76] Para. 892.
[77] Para. 892. The fourth ground of jurisdiction in favour of certain citizens of the United Kingdom and Colonies is not repeated, since most countries " are prepared to assume nullity jurisdiction . . . at the instance of a person who is domiciled there " (*ibid.*).
[78] For a comment on these proposals in the context of voidable marriages, see Grodecki (1957) 20 M.L.R. 566, 572–582.
[79] Para. 895.
[80] Para. 896.
[81] *Ibid.*
[82] Para. 884.

scant justification for this wide jurisdiction (it does not, however, extend to the present jurisdiction based on the celebration of the marriage in England [83]) is that " if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limitations upon the power of the court to make a declaration as to the nullity of the marriage, which will be binding on the parties themselves." [84] The Commission did not feel that the proposed jurisdiction would lead to any substantial increase in the number of applications, since in their view the suggested choice of law rules would render it pointless to come to England " if the remedy could be obtained from the court of the applicants' own country." [85] This ignores the possibility that the rules applicable under the proposed choice of law rules might be different from (and more favourable to the petitioner than) those applied under the law of the party's own country. However, a wide jurisdiction in respect of void marriages would be unobjectionable so long as the initial question of whether or not the marriage is void could be satisfactorily answered. Serious misgivings must be felt over the assertion of a virtually unrestricted jurisdiction in respect of marriages which are void only by reason of the imposition of English categories.

Those misgivings are increased by the absence from the Report of any discussion of the problem. The problem is an intractable one, so much so as to preclude the grant of an unrestricted jurisdiction in respect of void marriages save after a careful consideration of the demerits of franking English categories on marriages which may in all respects be foreign. It is easy to suggest that the effect of a defect in form should be tested by the *lex loci celebrationis*, and that the effect of a defect other than one of form of capacity should be determined by the law of the husband's domicile at the time of marriage. It is impossible to make any suggestion in respect of defects relating to capacity which is of any practical utility so long as the rule is that the laws of each party's ante-nuptial domicile have an equal voice on questions of capacity. If the rule were altered so that a petitioner could rely only on his own ante-nuptial personal law, then that system could consistently be given the further task of determining the character of the marriage. Such an alteration could not be adopted in proceedings in which the validity of a marriage arises only incidentally, and ignores the declaratory nature of proceedings in respect of a void marriage.[86] The alternative is to refer questions of capacity (and hence of the character of the marriage) to the law of the matrimonial home. As

[83] See *supra*, note 75.
[84] Para. 882.
[85] Para. 883.
[86] Grodecki (1957) 20 M.L.R. 566, 568, argues that a decree in respect of a void marriage always touches and concerns the " domestic relations " of the parties and hence is declaratory in form only.

we shall see, this is an alternative which the Commission must be taken to have rejected as a rule of primary reference.

The Commission's views on choice of law in suits to annul void marriages adhere, in general terms, to the present rules. Thus, it is recommended that defects in form should be governed by the *lex loci celebrationis*.[87] The recommendation is cast in wide enough terms to embrace the repeal of the Foreign Marriages Acts and the abolition of the common law marriage. We may doubt whether this was the Commission's intention, but at all events the Foreign Marriages Acts and the common law marriage are nowhere mentioned in the Report. The other category of defects " which render a marriage void by English law "[88] (it is not explained why English law should be adopted as a guide) are those in the nature of " personal " defects and it is suggested that they should be determinable by the personal law of the parties at the time of marriage.[89] Subject to the extended meaning of personal law which had already been discussed and the one exception hereinafter mentioned, this is but a restatement of the existing position.[90] There is, however, no mention of the present refusal to recognise foreign incapacities on the ground of public policy.[91]

The following exception to the general rule is propounded to avoid " unfairness ":

> " a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of marriage to make their matrimonial home and such intention has in fact been carried out." [92]

The justification is that

> " the validity of a marriage should in the last resort depend on the law of the country in which the matrimonial home has been established, because the status of a marriage pre-eminently effects society in the country where the parties live together as husband and wife. That country represents what has been called the ' true seat of the marriage relation,' and it seems socially undesirable that a union which is there regarded as not detrimental to the community should be pronounced void,

[87] Para. 886.
[88] Para. 887.
[89] Para. 887.
[90] See, for example, *Pugh* v. *Pugh* [1951] P. 482.
[91] The so-called " penal " incapacities, see Dicey, *Conflict of Laws* (6th ed.), p. 786. The rule in *Sottomayor* v. *De Barros* (*No. 2*) (1879) 5 P.D. 94 (which was not mentioned by the Commission) can be included under the heading of public policy, see Kahn-Freund, " Public Policy in the English Conflict of Laws " (1954) 39 Gro.Soc. 39, 53.
[92] Appendix IV, para. 4 (3). If this exception is adopted in the proposed legislation (it is omitted from the present draft Bill) it should be made to apply not only to proceedings to annul a marriage but also to other proceedings in which the validity of a marriage falls to be decided. It would be incongruous to have different choice of law rules according to the form in which the problem comes before the court.

> merely because one or other or both of the parties were formerly connected with a country in which a different view prevails." [93]

This appears to justify too much, for is it not also socially undesirable to pronounce as valid a marriage which is unobjectionable by the law of the parties' ante-nuptial domiciles but void by the law of the matrimonial home? Or to pronounce as void a marriage which is formally invalid by the *lex loci celebrationis* but valid by the law of the matrimonial home? The Commission must be taken to have rejected the law of the intended matrimonial home as being the law governing the capacity to marry, but having so done they permit it as an alternative test in an illogically defined category of case. Should there not be only one rule, and do not the reasons which induced the Commission to reject the law of the matrimonial home as a rule of primary reference also apply to its use as an alternative rule? The exception does not extend to marriages celebrated in England because "it would be undesirable . . . that the English . . . courts should be required to recognise the validity of a marriage celebrated in England . . . in circumstances which render the marriage void under English . . . domestic law." [94] This passage assumes that the various provisions of the Marriage Act, 1949, relating to, *e.g.*, consanguinity, affinity and nonage, apply not only to persons domiciled in England but also to persons marrying in England. If this is a correct inference (and the existing law is uncertain [95]) it is strange that the Commission did not make a similar *caveat* in respect of marriages whose validity falls to be determined solely by the law of the parties' ante-nuptial domicile. Thus, if an uncle and niece who are domiciled in Arcadia where marriages between persons of that relationship are valid marry in England and then settle here their marriage would apparently be held valid. If, on the other hand, an uncle and niece who are domiciled in Ruritania where marriages between persons in their relationship are invalid, marry in England and settle in Arcadia, their marriage would apparently be treated as invalid. The contrast is incongruous, but it is submitted that the Marriage Act, 1949, ought to apply to all marriages taking place in England. Such a rule would prevent precocious twelve-year olds and amorous blood relatives taking advantage of their domiciliary rules in England.

Jurisdiction of Foreign Courts in Nullity

The Commission considered that recognition of nullity decrees should be based upon the same general principles (*viz.*, reciprocity and regard for the personal law) as were suggested in connection

[93] Para. 889.
[94] Para. 890.
[95] See Cheshire, *Private International Law* (5th ed.), p. 307; Fleming, "Marital Capacity" (1951) 4 I.L.Q. 389.

with divorce.[96] Accordingly, an annulment obtained in or recognised by the law district of the personal law (or laws) should be recognised regardless of whether the foreign court applied an appropriate system of law.[97] Where a foreign decree is neither pronounced nor recognised by a court of the personal law then a distinction is drawn between the annulment of void and voidable marriages. It does not appear which law is to determine the all-important question of whether the marriage was void or voidable. The annulment of a void marriage should be recognised whatever the jurisdictional basis if the decree was obtained in compliance with choice of law rules similar to those proposed for the English court.[98] The annulment of a voidable marriage should be recognised only if the foreign court purported to exercise jurisdiction in circumstances substantially similar to those in which the English court would exercise jurisdiction (including the application of the personal law).[99] No provision is made for the case where an English court would in fact *mutatis mutandis* have exercised jurisdiction.

Concluding Comment

The preceding observations will have shown that Part XII of the Commission's Report is comprehensive if not exhaustive. Their task was an unenviable one. Few would contend that the present state of this branch of the law is in all respects satisfactory, and few would agree upon solutions for the present difficulties.[1] If one believes with the Commission that recognition of foreign matrimonial decrees should be based upon reciprocity the problem of the recognition of foreign decrees becomes subservient to that of determining the jurisdiction of the English court. The fundamental difficulty in making that determination lies in attempting to reconcile two conflicting desires. First, the desire to avoid the creation of limping marriages by pronouncing decrees which stand little chance of recognition abroad. Secondly, the desire to grant matrimonial relief to those who one conceives should be entitled to it. If the English courts could grant a decree only when both parties were citizens of the United Kingdom and Colonies who were domiciled and resident in England it could be guaranteed that an English decree would receive almost universal recognition. Thus, the first desire would be fulfilled, but only at the expense of the second. In an imperfect world [2] a compromise must be sought, and the compromise should, for the sake of enabling people to order

[96] Para. 900.
[97] Para. 901.
[98] *Ibid.*
[99] *Ibid.*

[1] See para. 797 (" no two witnesses were exactly agreed on a solution ").

[2] The Commission were not, however, entirely despairing of the prospects of an international convention " providing for the recognition of divorce decrees obtained in the signatory countries " (para. 860).

their affairs with confidence, be a simple one. The Commission's stoutest protagonist could not describe their recommendations as simple, but this would be beside the point if it could be demonstrated that the recommendations served to reconcile so far as is possible the two conflicting desires. The reader must be left to judge for himself whether the Commission have made that demonstration, but it is submitted the verdict is far from clear.

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SOVIET LAW AND GOVERNMENT*

THE Russian Revolution is often compared with the French Revolution. Perhaps a more fruitful analogy, however, would be that of the English Revolution of 1640–1689. The Russian Revolution has gone through a "Puritan" stage—radical, utopian, supranational; since the mid-1930's it has undergone a kind of Restoration—a stabilisation of social relations, a return to certain pre-Revolutionary Russian traditions and to patriotism; and today the Revolution seems to be groping for some final synthesis, a "glorious" *dénouement*.

The fact that the Russian Revolution is still unfolding makes it difficult to interpret. Yet the continuity over a period of forty years is great enough so that we may now be in a position to say —not, indeed, with the same confidence with which we can speak of the English Revolution—that certain characteristics of the Soviet "system" are essential and fundamental. The development of the Soviet legal system gives us important clues as to what those basic characteristics are, just as the seventeenth-century English legal history reflected what was permanent in the English Revolution. Moreover, Soviet legal development, I believe, both reveals and influences the drift, the tendency, of the Russian Revolution towards a final *dénouement*.

Before attempting to interpret the development of Soviet law, it is necessary to speak of Soviet government in general, for according to the Soviet way of thinking law is nothing but an aspect of government. Such a concept assigns to law a narrower sphere of operation and influence than under our system, in which law is, in some respects, broader than government and exercises a check upon it. On the other hand, we cannot speak of Soviet government in the same sense as that in which we speak of American or English government, that is, as the system by which political leaders are selected and the system by which they exercise their political responsibilities; for government in the Soviet system is fused with all aspects of social life—the political leaders of the Soviet State are at the same time the economic leaders who manage industry, agriculture, trade, and so forth, and they are also the cultural leaders who make policy for the arts and sciences and who lay down, even, principal lines of *thought* for the entire people.

In this system of government, the election of representatives to the legislative assemblies, the election by these legislative assemblies of executive organs and of the higher judicial organs, the federal

* A public lecture delivered at the London School of Economics and Political Science on January 22, 1957.

union of constituent and so-called autonomous republics, the protection of the constitutional rights of citizens, and all the other *conventional* apparatus of government, form—and are intended to form—only a subordinate part of the machinery through which the *real* system of government works. The real system of government is identical with the system of social control as a whole. It is this identity of politics with social control as a whole that is the very essence of the total State.

In view of the fact that one finds in current Soviet legal literature a certain amount of agitation for reform of the legislative and administrative system, it is perhaps worth emphasising that the Constitutional machinery of government is not intended to be the whole, or indeed the principal, source of political authority in the Soviet Union. Although the Supreme Soviet of the U.S.S.R., for example, is, according to the Constitution, " the highest organ of State authority," in fact that body consists of some 1,300 representatives (many of them artists, " heroes " of one kind or another, and so forth) who meet for a week or two at a time twice a year to endorse unanimously the measures presented to it. It is essentially an honorary society, which, however, like medieval parliaments, may carry the grievances of the localities to the central authority in return for voting the taxes, so to speak, and going back to the localities to help make them palatable. The efforts of Soviet jurists today to regularise the procedures of the Supreme Soviet (to get the State budget presented to it, for example, before that budget has already gone into effect, to have enacted a law on recall of representatives by their constituents, and so forth) fall very far short of an attempt to convert that body into a legislature in the modern Western sense.

The Presidium of the Supreme Soviet (not to be confused with the Presidium of the Central Committee of the Communist Party, formerly called the Politburo), consisting of thirty-three members chosen from the Supreme Soviet to conduct its affairs between sessions, would perhaps qualify in terms of size to be the supreme governing body; and under the Constitution it is authorised to issue edicts (" ukases ") which do in fact form the legal basis for most of the major activities of the Soviet Government. However, the Presidium's membership does not include the present Chairman of the Council of Ministers (Bulganin), the present Secretary of the Communist Party (Khrushchev), and several other top Soviet leaders, so that one may doubt that it exercises the initiative in much, at least, of its legislation. Moreover, many of the edicts of the Presidium of the Supreme Soviet merely enact decrees already passed by the Council of Ministers.

Is it, then, the Council of Ministers which really governs the Soviet Union? Under the Constitution the Council of Ministers is " the highest executive and administrative organ of State authority," and technically it is called " the Government "—like the British

Cabinet. But it is not like the British Cabinet. The Soviet Council of Ministers consists of the heads of the various economic, political, military, social and other branches of the Soviet State—in recent years about fifty in number. The economic ministries (agriculture, metallurgy, coal, oil, chemicals, machine construction, and the like) are the most numerous, comprising about thirty-five. Non-economic ministries include those of foreign affairs, internal affairs, defence, justice, health, culture, and others. It is the Council of Ministers which makes and executes the national economic plan, directs the general organisation of the armed forces, and in general runs the day-to-day activities of Soviet officialdom. Its " decrees and regulations " are, in fact, the operative legislation of the Soviet Union.

The importance of the Council of Ministers is precisely indicated by the fact that its leaders are drawn from the Presidium of the Central Committee of the Communist Party. While we know nothing of the nature of the deliberations of the Council of Ministers—even its decrees have not been regularly published since 1950—it seems unquestionable that significant conflicts of interests among the various ministries represented there are *not* resolved by a majority vote of all ministers. Basic policy decisions are undoubtedly made by the chairman and vice-chairmen—that is, by the top Party leaders.

Speaking broadly, it is, of course, the Communist Party that governs the Soviet Union. This is stated in the Constitution itself, which declares that the Communist Party is " the leading core of all organisations, . . . both social and State." The Party is not a political party in the Western sense: it does not represent a class or classes, or a special political-interest group or groups, and it does not campaign against any other party. It is rather " the central core of conscious socialists," the " shock troops " in all phases of social, political and economic life. Long since purged of its revolutionary romantics, the Party is largely a professional elite of officials, administrators, technicians, and privileged workers; its watchwords are discipline and loyalty.

The Communist Party stands behind the entire complex constitutional and organisational structure of the Soviet State. Without the Party that structure would be too unwieldy to operate. But the Party itself, with its more than seven million members, is a complex and unwieldy mechanism whereby to run a highly centralised society. Theoretically, the Central Committee of the Party, elected by local, regional, and republican Party representatives, designates a Presidium which is responsible to it. In fact, the Presidium controls the Central Committee which in turn controls the subordinate Party organs reaching down through all levels. Only at the very top—at the Presidium level—is there authority unqualified, and even there its distribution is precarious.

Speaking more precisely, then, the Soviet Union is really governed

not by any distinct governmental or political body or bodies but by one, two, three, five, or eleven men, plus whomever else they may bring in to rule with them—men who have risen to positions of leadership through any one of a multiplicity of channels: Party organisations as such, economic management, armed forces—but who are essentially Party leaders rather than leaders of some organisation within or without the Party.

It can be demonstrated, I believe, that the armed forces, the economic ministries, even the Party itself, as organisations, do not play independent roles. The top leaders have the initiative and use the organisations to symbolise and to effectuate their policies. The authority of the top leaders is essentially personal rather than organisational. Their relationship to each other is likewise a personal one and is not determined by the relationship of the organisations to each other. The last thing that any of the top leaders wants is to be identified with a particular organisational hierarchy: they want only to be identified with "the Party," which is the "central core" of *all* Soviet organisational hierarchies.

Thus, the contribution of the Russian Revolution to the development of constitutional law is the adaptation of autocracy to twentieth-century industrial society. It is a dismal fact, which we must face squarely, that the Communist principle of leadership—whether "individual" or "collective"—seems to have shown its viability in Soviet Russia, its capacity to survive the leader's death.

When we think of the instruments whereby the Party leadership governs, we think immediately of the Terror. Yet we misunderstand Soviet autocracy if we focus our entire attention on its repressive features. Terror there is, terror there must be, against enemies of the system. But the Soviet State system works *also* through law, through regular processes of deliberations and hearings, with observance of rules of procedure and resolution of conflicts according to objective standards of rights and duties.

We have heard a great deal about Soviet legality—and violations of Soviet legality—from the top Soviet leaders and from the Soviet press in the past four years, and especially since the Party Congress of February, 1955. But—many ask—how can one speak of law in a society which, according to its own leadership's admissions, has been subjected to a system of arbitrary arrests, extorted confessions, secret trials, and political executions—in short, a system of "arbitrariness and lawlessness," to use Khrushchev's own words?

The fact is that it is perfectly possible to have despotism or tyranny and at the same time, in spheres of social and economic relations not directly connected with politics, a system of law. We have only to think of the legal system which Roman tyrants fostered, or the legal system which existed under the Tudor despotism.

Under Stalin, as today, any person in Russia who visited Soviet

trial and appellate courts could see lawyers, or the parties themselves, arguing cases before a three-judge court—not only in criminal cases but also in civil disputes over rights to living space, job reinstatement and back pay, divorce, author's royalties, and a host of other matters. It is worth noting that a special system of courts decides contract disputes among State business enterprises, and that there are over 400,000 such cases tried every year.

Stalin learned that a planned economy cannot function without a highly developed legal system, and that law is an essential means of preserving the stability of social relations even under socialism. The importance of the Stalinist emphasis on stability of laws in the non-political sphere is clearly apparent today when law reform in both the political and the non-political spheres is serving as a means of promoting the popularity and the efficiency of his successors' government.

The law reforms of the past four years have been substantial, and give promise of continuing. I shall not attempt to recapitulate them here, as they have now been described in many places. It is important, however, to understand the limitations of this reform movement. With respect to law reform in the non-political sphere —in labour mobility, pensions and social security, supervision of labour camps, protection of the accused in criminal cases, elimination of criminal penalties for certain minor offences, independence of the judiciary from the Ministry of Justice, and other matters—it is important to understand that this does not represent a fundamental departure from Stalinist policy since the mid-1930's, but that it is, nevertheless, a rapid acceleration of more liberal tendencies which were already apparent in the last few years before Stalin's death.

Secondly, with respect to law reforms in the political sphere—release of many political prisoners and denunciation of the abuses of law whereby they were sentenced, reduction of the power of the secret police, elimination of secret administrative trials, elimination of special court procedures in certain types of cases of counter-revolutionary crimes—it is important to understand that this does represent a fundamental change in Stalinist doctrine: that is, it is a pledge by the régime that only real enemies, and not potential enemies, are liable to punishment. But the régime has not given up any of its power, or any of its determination, to punish those whom it considers real enemies.

Specifically, with respect to political crimes, the post-Stalin Government has introduced drastic changes in procedure for trial of persons charged with counter-revolutionary crimes, and has denounced the pre-trial extortion of confessions in political cases which (it is now admitted) formerly existed, but it has not changed, and there have been no suggestions to change, the substantive law of counter-revolutionary crimes. Article 58 of the Criminal Code provides that any act shall be considered counter-revolutionary

" which is directed toward the overthrow, undermining, *or weakening* . . . of the basic economic, political, and national [*i.e.*, ethnic] achievements of the proletarian revolution." [Emphasis supplied.] There is no talk of changing this provision more than slightly—perhaps by substituting some such word as " anti-State " for " counter-revolutionary." So long as it remains in force, the Soviet Government will have no difficulty in securing convictions—in open trials conducted fairly—of people proved to be active opponents of basic government policies.

Last spring, for example, an American journalist in Moscow witnessed the trial of several men charged with " counter-revolutionary agitation." They were accused of making propaganda for Zionism. They pleaded not guilty and defended themselves vigorously—and were convicted. What is unusual is the plea of not guilty in a political case, the vigorous defence, and the public trial.

I asked a leading Soviet jurist in 1955 whether the retention of the provisions of Article 58 would not reduce considerably the significance of the other law reforms now being introduced. He replied: " It is true that no substantial change is being considered in the [substantive] law of counter-revolutionary crimes. But the climate has changed, and that has great significance."

Since the twentieth Party Congress of February, 1956, the " change of climate " has seemed more like a ferment, with students, workers, and in at least one case crowds, protesting against policies of the régime itself and demanding still greater concessions than the ones offered. It is striking to see this ferment reflected in the pages of the leading Soviet legal and political journal, *Soviet State and Law*, which devoted large parts of each of its 1956 issues to articles urging still further reforms.

For example, hunger for contact with the West—and the great intensity of this hunger among large sections of the population is a striking fact to which many Russian-speaking Westerners who have visited the Soviet Union since the summer of 1955 can testify—is manifested in a recent article in *Soviet State and Law* urging legal scholars to study foreign law and to recognise that " bourgeois " law is " not static " and that by no means all " bourgeois " jurists are " reactionaries."

Another recent article asks how it is possible for professors of criminal law to teach their courses adequately when criminal statistics are not published and when correctional institutions are governed by secret administrative regulations.

Still another recent article complains that there are many matters governed by administrative sanctions which ought to be within the jurisdiction of the courts, in order to " strengthen legality."

Many other examples of what one might call an agitation for further reforms, further liberalisation, could be given. Yet it is

important that we recognise the limitations of this agitation, too. We must remember that, like the "change of climate" of 1953–1955, the "ferment" of 1956 was called for by the top leadership. There are few, if any, signs that *in Russia*—in contrast to Hungary and Poland—it has gone beyond the limits anticipated by the top leadership.

There is every reason to believe that the rulers of Soviet Russia genuinely need—and genuinely desire—a far-reaching reform of the system of law and government, a reform which will insure greater initiative from below, less mutual suspicion and fear on the part of people at all levels, more real cooperation with government policies. Realising that some "ferment" is essential for the creation of this new beverage, they have also believed that the process would not cause an explosion when the new beverage is poured into the old bottles. That belief proved false in Hungary, but so far it has proved correct in the Soviet Union itself.

The difference between the response of the Russians on the one hand, and the Poles, Hungarians, and other Eastern Europeans on the other, is due, of course, to many factors, among which the desire for independence on the part of peoples too proud to remain satellites probably takes first place. But one must also include among the factors the difference in legal and political traditions of Russia and the West. Partly because the Russians have never had a deep-rooted tradition of a system of law which binds the top leadership, they have responded to their Government's programme of liberalisation with gratitude, and without bitterness at its incompleteness. The Hungarians, on the other hand, with their Western tradition that legality is a mockery unless it binds the State itself, have responded with demands for effective limitations upon the powers of the leaders.

Yet in Russia, too, the drive for "strengthening socialist legality," and the emphasis upon implementing the Constitution, exerts some pressure toward establishing certain controls—too loose to be called legal—over the men at the top. This pressure, combined with the more powerful political forces which the "collective leadership" has released, may result in a redistribution of authority within the Communist Party and, more particularly, the creation of procedures which would give the Central Committee effective control over the Presidium. It is some such change which I have in mind when I speak of final *dénouement*, for it would be a kind of Act of Settlement which would assure the stability of the leadership and its continuity from generation to generation.[1]

Whether or not this speculation comes true, I think it must be

[1] The procedure whereby the Central Committee removed Molotov, Malenkov and Kaganovich from the Presidium in June, 1957, despite the fact that these men had apparently been able to carry a majority of the Presidium itself (if diplomatic reports on this are to be trusted) seems to be a partial fulfilment of this prophecy.

recognised that the Russian Revolution of 1917, like the French Revolution of 1789 and the English Revolution of 1640, has produced a legal order which embodies the basic principles of the Revolution, which gives the Revolution institutional form and hence the capacity to survive the death of its leaders.

Unlike the Western Revolutions, however, the Russian Revolution has not produced, and gives no sign that it will produce, a legal order which binds the highest leaders (whether these be a single man, a Presidium, or a Central Committee). The *role* of law should not be confused with the *rule* of law, and the increase of the former does not lead naturally and inevitably to the other. On the contrary, under a State which takes responsibility not only for the political life of the society but also for its economic and cultural life generally, that is, under a total State, a highly developed legal system is, in the long run, a necessity—and the rule of law an impossibility.

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THE DELIVERY OF CHATTELS

THERE is the famous rule that to obtain rights to chattels a manual delivery is required from donor to donee.[1] This rule was nurtured by a long history from Bracton[2] to *Cochrane* v. *Moore*,[3] and has become a veritable axiom in English law. It is true that today several prominent exceptions overshadow the residuary rule[4]; but the delivery-requirement remains much alive, and it is its basic nature that we shall hereafter discuss.

THE PRINCIPAL THEORIES OF DELIVERY

Consider at the outset some primary and macroscopic points. Why has the law ever insisted on actual delivery and why does it still do so in the case of gift and pledge?[5] Is delivery a useful requirement in a modern or functional sense? Or is it mainly a survival, justified by historical continuity and little else? Speaking of the medieval position, when delivery was essential in sale as in gift,[6] Maitland thought that the rule of manual transfer was not derivable from "considerations of public policy" or from "a wide view of social needs," but derived from what he described as "a mental incapacity, an inability to conceive that mere rights can pass from person to person."[7] A transfer of things was obvious, it was "visible to the eye; but how rights? You have not your rights in your hand or your pocket, nor can you put them into the hand of another nor lead him into them and bid him walk about within their metes and bounds." The accomplished jurist, continued

[1] *Cf.* "A Rationale of Gifts and Favours" (1956) 19 M.L.R. 237. The present paper pursues, in some respects, the discussion of the previous one; but this from an obverse, which is also the more orthodox, point of view.

[2] Bracton, f. 38b, f. 41, f. 62.

[3] (1890) 25 Q.B.D. 57; and see 7 Holdsworth, *H.E.L.*, 504 *et seq.* The decision settled an old controversy: see authorities cited therein. At its time, "the historical method was at the height of its vogue. Accordingly, the elaborate opinion of Fry L.J. proceeds neither upon analogy nor upon analytical reasoning as to the elements of the legal transaction of gifts, but upon an elaborate historical investigation": Pound, "Juristic Science and Law" (1918) 31 Harv.L.R. 1047, at 1056.

[4] Briefly, delivery is no longer necessary where a chattel is acquired by sale, by deed or by way of trust. Concerning the last as well as some other (and less well-known) exceptions germane to gifts, see article mentioned note 1.

[5] For pledge, see *Reeves* v. *Capper* (1838) 5 Bing.N.C. 136; *Martin* v. *Reid* (1862) 11 C.B.(N.S.) 730, 733; *Ex p. Hubbard* (1886) 17 Q.B.D. 690, 698; *Hilton* v. *Tucker* (1888) 39 Ch.D. 669, 673; *Dublin City Distillery, Ltd.* v. *Doherty* [1914] A.C. 823, 843, 852; *Waight* v. *Waight* [1952] 2 All E.R. 290, 292. Delivery can similarly be essential in absolute bills of sale: *Robinson* v. *Briggs* (1870) L.R. 6 Exch. 1; *Ancona* v. *Rogers* (1876) 1 Ex.D. 285; *Seal* v. *Claridge* (1881) 7 Q.B.D. 516.

[6] 3 Holdsworth, *H.E.L.*, 354–355; 7 Holdsworth, *H.E.L.*, 503–504.

[7] "The Mystery of Seisin" (1886) 2 L.Q.R. 481; *Collected Papers*, i. 358, 372–373; *Select Essays in Anglo-American Legal History*, iii, 591, 601–602.

Maitland, entertains a different view: "when a gift is made of a corporeal thing, of a sword or a hide of land, rights are transferred; if at the same time there is a change of possession, that is another matter; whether a gift can be made without such a change of possession, the law of the land will decide; but every gift is a transfer of ownership, and ownership is a right or a bundle of rights; if gift be possible, transfer of rights is possible." Such ideas, Maitland concluded, may prevail "in these analytic times; but I may have here and there a reader who can remember to have experienced in his own person what I take to be the history of the race, who can remember how it flashed across him as a truth, new though obvious, that the essence of a gift is a transfer of [things]."[8]

Yet on this occasion Maitland does not take us very far. His thoughts contain a curious mixture: half-Year Book, half-Austin, with a dash of Savigny to boot.[9] Nor does his accomplished jurist truly meet the medieval point. That point, essentially, is not that one cannot transfer rights, but that transferring rights and things is all one. Moreover, in requiring a manual delivery medieval law was systematic in the best sense of that word. For the delivery or livery of seisin, both of land or chattels,[10] had this specific effect: it formalised the *causa traditionis*, and especially the donor's *voluntary* parting with possession in either sale or gift. For in the many disputes about things, it often was essential to trace one's rightful ownership, or possession, or seisin—one's "rightful" as distinct from one's "wrongful" holding a thing—to a donor, a warrantor, *an auctor*, who had freely consented to give.[11] All this reflects the cruder realities of medieval life and above all the self-executive nature of its law. In this light, the delivery-requirement did represent "considerations of public policy" as well as "social needs," and it is thus of little help to fasten on mental incapacity as an ultimate legal source.

But what of "these analytic times"? Several explanations

[8] The three printed texts put "rights" for the word "things." But this must be an error or a misprint. Since Maitland was drawing a contrast between (i) the accomplished jurist who sees in the transfer of chattels a transfer of rights, and (ii) the "unanalytical" reader who sees a new truth, what can the latter see but a transfer of *things*? My substitution of "things" for "rights" is further supported by Maitland's next line: "You cannot give what you have not got—this seems clear; but put just the right accent on the words *give* and *got*, and we have reverted to an old way of thinking. You can't give a thing if you haven't got that thing, and you haven't got that thing if someone else has got it." Surely this "materialism which is natural to us all" makes for a transfer of things rather than that of rights.

[9] But these were perhaps Maitland's earlier thoughts. Compare 2 Pollock and Maitland, *H.E.L.*, 180–181, where the whole matter is somewhat differently explained.

[10] Maitland, "The Seisin of Chattels" (1885) 1 L.Q.R. 324; *Collected Papers*, i, 329; Ames, "The Disseisin of Chattels" (1890) 3 Harv.L.R. 23, 313, 337; revised and reprinted in 3 *Select Essays*, 541.

[11] *Cf.* 2 Holdsworth, *H.E.L.*, 110 *et seq.* (esp. at 113); 3 Holdsworth, *op. cit.*, 319 *et seq.*; 2 Pollock and Maitland, *op. cit.*, 162 *et seq.*

have been put forward to place the delivery of chattels on more modern grounds. To one accomplished jurist, Lord Esher M.R., manual delivery was part of the definition of gift itself: "It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition. . . . [In] ordinary English language, and in legal effect, there cannot be a 'gift' without a giving and taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a 'gift.'"[12] This explanation, however, will not do. Although the word "gift" may now mean what Lord Esher said, his definition does not explain the function but merely repeats the result of a rule, *i.e.*, that delivery is necessary for the completion of a gift. We still do not know why, rationally, delivery should have this effect.

More to the point is a theory expounded by Professor Mechem.[13] Thus, delivery is a piece of legal pragmatism, based on considerations which are "by no means medieval but [are], on the contrary, as valid today as ever, being rounded in ordinary experience and the fundamental habits of the human mind," particularly in "the normality of delivery in the case of a gift."[14] Hence, the necessity for a physical transfer is "instinctively felt." Where A shows his watch to B saying "I hereby give you this watch," but then returns it to his pocket, both parties would feel this transaction to be abnormal and void: A might wonder why he did not hand over the watch, and B might think that A was in a jocular or trivial mood. This pragmatic explanation certainly contains an element of truth, the same truth, indeed, that flashed through Maitland's mind.[15] But the vice of this theory is that it tries to prove too much. For whatever be the normal or frequent case, some donative gestures can be understood by both parties to be genuine and sincere. The pragmatic theory is confined to the situation which is jocular or vague; it does not extend to other situations, nor explains the delivery-requirement as a whole.[16]

[12] *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57, at 75–76.

[13] Mechem, "The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments" (1926–1927) 21 Illinois L.R. 341, 457, 568. Mechem's was the most ambitious effort to put the delivery-requirement on a rational basis; but the attempt, I believe, fails as a whole. His discussion is, however, most valuable and instructive on many points. For further criticism, see notes 14 and 16, *infra*.

[14] *Ibid.*, at 346–347 and *passim*. To Mechem, the "pragmatic approach" means "the attempt to frame rules which will fit with a minimum of friction into the mechanism of ordinary life" (*ibid.*, at 365), as well as the specification of "the legal desiderata" which delivery seems to satisfy (*ibid.*, at 342). The former objective has little clarity in precise terms; the latter, though more clearly definable, cannot, however, be stated over the whole field: see note 16.

[15] See text at note 8, *supra*.

[16] More broadly, the pragmatic explanation really says no more than this, namely, that trivial promises of gifts remain unenforced because they are hardly promises at all. Thus, applying the normality-test on which the pragmatic theory depends, a millionaire's promise to a tramp would be too

Very similar is (what may be called) the evidentiary view. According to it, the mere fact of delivery evinces certain factors of proof deemed vital to the enforcement of gifts. For, again in the words of Mechem, "[the] wrench of delivery, if the expression be understood and permissible, the little mental twinge at seeing his property pass from his hands into those of another, is an important element in the protection of the donor."[17] In other words, while a donor may hastily speak, he will not hastily give, so that delivery becomes a "simple and automatic safeguard" for him. Concurrently, delivery gives actual possession to the donee, and the law will not presume that possession has been unlawfully obtained. The presumption arises because it "is easier to fabricate a story than to abstract the property"; hence the donee's possession becomes the best evidence of the donor's true consent to the gift.[18] So seen, delivery not only forestalls the fraudulent claim, it enshrines the wisdom of the ages in a simple manual act. But though persuasive, the evidentiary theory has one serious flaw: like the pragmatic view it also overreaches itself. If we must not relegate questions of evidence (as adjective law) to a subordinate place, it is still true that evidentiary problems are subsidiary or subsequent to substantive ones. Proving a claim is, obviously, not the same as deciding whether the claim as such has merit or has none. Suppose that the donor's intention is uttered in circumstances allowing of no suspicion of perjury or fraud: how would the law then deal with an honest demand? Some donees, admittedly, may make fraudulent claims, but others may not; yet to the honest claimant the evidentiary argument cannot possibly apply. Are we then to treat the non-fraudulent claim in the same way as the fraudulent one? It would be strange and fallacious if we did. However, it is precisely this evidentiary theory that lawyers usually advance, when trying to justify the delivery-rule on grounds other than history and precedent to be followed merely for their own sakes.[19]

jocular or vague; but (say) a father's donative promise to a son would suggest sincerity rather than a joke. Moreover, the pragmatic theory contains an inconsistency within itself. For, on the one hand, it at least accepts the unenforceability of even sincere or serious gift-promises if no delivery has taken place; on the other hand, it regards delivery as the principal test of a sincere promise, the delivery disproving jocularity. Again, the pragmatic theory does not tally with its stated objective, *i.e.*, to avoid friction in ordinary life (see also note 14). For example, a promised but non-delivered gift from father to son (which, lacking delivery, would be ineffective) causes, perhaps, more friction than the principle is worth. This and other theories show that the dilemma posed by delivery is not easily resolved. One thing is clear: we cannot state one principle covering the whole field. The only sensible approach is to distinguish between donative promises of various kinds and inquire into the enforceability of each. For an attempt along these lines, see article note 1, *supra*.

[17] Mechem, *loc. cit.*, at 348.

[18] *Ibid.*, at 349–350. And see Pollock and Wright, *Possession in the Common Law* (1888) 57, 62 and *passim*.

[19] Disputing Pound's suggestion that the delivery-requirement rests on purely historical grounds (see note 3, *supra*), Harlan F. Stone made a special claim

CONSTRUCTIVE DELIVERY

After these broader explanations such as they are, let us turn to a more microscopic examination of the meaning of delivery itself. For the law has, in several instances, dispensed with the necessity for a complete transfer; it developed a notion of "constructive delivery" which, for convenience, may be divided into three distinct kinds. Concerning the first, it was said already in 1750 that "a delivery of all the muniments and means of reducing a ship or cargo at sea into possession is in law delivery of them. So a delivery of the key of a warehouse is a delivery of those goods, which are bulky, being the only immediate delivery the things are capable of."[20] This was, of course, most convenient in commercial law, since the transfer of a bill of lading, likened to that of a key, could be construed as a full transfer of the goods.[21] Yet this type of situation affords a peculiarity not to be missed. Here the buyer has anyhow a contractual right to the delivery promised by the vendor. The constructive delivery (by bill of lading, etc.) does not, therefore, create a primary legal relation between vendor and vendee; it, rather, adds to the already existing relation certain secondary or (in a word) "negotiable" effects.[22] Thus, very briefly, the transferred bill of lading will permit the buyer to sell the specific goods long before they arrive, and the transfer will also protect him against a subsequent purchaser should the vendor fraudulently sell the same goods twice.[23]

However, our real concern now is with primary legal effects; more precisely, the effect of a constructive delivery on a donee's right *in specie* to the goods, where without such delivery he would take nothing at all. One can at once see the practical problem. As big and bulky things cannot be handled or delivered in the

for the evidentiary theory in the case of deceased donors: "Delivery in Gifts of Personal Property" (1920) 20 Col.L.R. 196, 197n. Though it is so much easier to fabricate stories of gift where the alleged donor is dead, the fact is that some stories are true, and the loophole in the theory thus remains.

[20] *Ryall* v. *Rowles* (1750) 1 Ves.Sen. 348. The case is instructive, as it shows how the delivery problem connects with questions of pledge, bankruptcy, fraudulent conveyances, assignment of *choses in action* and even partnership. Here, A mortgaged his utensils and stock-in-trade to B, but continued in possession of them. When A went bankrupt, there was the usual question of priority between B and A's general creditors. *Cf.* Waldock, *The Law of Mortgages* (1950), 77.

[21] 1 Ves.Sen. at 362. To same effect, *Atkinson* v. *Maling* (1788) 2 T.R. 462 (mortgage of a ship at sea).

[22] For this "negotiability" of a bill of lading, see Chorley and Giles, *Shipping Law* (3rd ed., 1950), 152–153; 30 Halsbury's *Laws of England* (2nd ed., 1938), 403–404. Other mercantile documents such as delivery orders, wharfinger's certificates, etc., do not similarly "represent" the goods but are tokens of authority to receive possession. To complete delivery, the bailee or warehouseman must, therefore, "attorn" to the vendee: *Bentall* v. *Burn* (1824) 3 B. & C. 423; *Farina* v. *Home* (1846) 16 M. & W. 119; *McEwan* v. *Smith* (1849) 2 H.L.C. 309. See Benjamin on *Sale* (8th ed., 1950), 742; also Maitland, *loc. cit.*, *Collected Papers*, i, at 377; *Select Essays*, iii, at 605.

[23] *Cf. Sanders* v. *Maclean* (1883) 11 Q.B.D. 327, 341; *Barber* v. *Meyerstein* (1867) L.R. 2 C.P. 38, at 48; (1867) L.R. 2 C.P. 661; (1870) L.R. 4 H.L. 317; Pollock and Wright, *op. cit.*, 67.

same manner as a watch or similar small and manuable things, the requirement of a complete, manual delivery breaks down in a physical as in a legal sense. It follows that big things need a modification of the "corporal touch,"[24] a good illustration of which is *Rawlinson* v. *Mort*.[25] A parishioner had lent an organ to his church, the vicar acknowledging by letter that the organ was merely loaned. The parishioner told the organist that he wished to give the organ to him and handed him the receipts of the purchase-money as well as the vicar's letter, two documents meant to serve as indicia of title. The donor later reiterated the gift by placing his hand upon the organ in the presence of the plaintiff and another witness. The organ remained in the church. It was held, after the donor's death and against the vicar who disputed the organist's claim, that the delivery of the documents to the donee constituted a valid gift; even if the gift was not then complete, the donor's subsequent action certainly completed it. In this situation, apart from having the organ removed, no simple manual delivery was feasible at all; and if the organ was to be "delivered" in some sense, it could only be *constructively* delivered, and this in one of two ways. (i) Had the organ been stored behind lock and key, the key would have provided the most effective access to it. But (ii) since the organ was in an open place, constructive delivery could operate only through improvised symbols such as the letter and the receipts.[26]

[24] See *Ellis* v. *Hunt* (1789) 3 T.R. 464, at 468.

[25] (1905) 21 T.L.R. 774, 93 L.T. 555; but see, for another interpretation of this case, note 34, *infra*. Similarly in *Lock* v. *Heath* (1892) 8 T.L.R. 295, a (deceased) donor verbally gave all his furniture to his wife, coupled with the symbolic delivery of one chair. It was held that this was a valid gift even without a deed of grant.

[26] Symbolic(al) delivery has raised a special difficulty of its own. In *Ward* v. *Turner* (1752) 2 Ves.Sen. 431, 442–443; 1 Dick 170, 172, Lord Hardwicke said that the transfer of a mere symbol would not be enough; he accordingly held that the delivery of receipts (of South Sea annuities) could not effect a *mortis causa* gift. Not only has the law, as regards the latter, considerably changed (see *Re Wasserberg* [1915] 1 Ch. 195), but Hardwicke's real purpose was only to distinguish between manuable and non-manuable things. For example, not even the delivery of a key to the receptacle of the annuities could have been an effective (constructive) delivery, as the annuities were manuable things (2 Ves.Sen. at 443). Unfortunately, it has been thought that Hardwicke meant more than this. Thus, it has been said that symbolic and constructive delivery are not the same, the distinction being between a symbolic delivery (by representative things, *e.g.*, samples, photographs) and a constructive delivery by key, the latter giving means of access which mere symbols do not. See Pollock and Wright, *op. cit.*, 60 *et seq.*; Barlow, "Gift Inter Vivos of a Chose in Possession by Delivery of a Key" (1956) 19 M.L.R. 394, 395 *et seq.* The question, however, is whether this distinction can be sustained. For one thing, delivery by key is only possible where the thing is locked up. For another, even delivery by key does not necessarily involve a real change of control, as the next example in text will show. Of course, some symbols seem more appropriate than others: a bill of lading looks more effective than a photograph. On the other hand, some donors (as in the above organ case) have no bills of lading to hand over; and if they must improvise their symbols why should not a photograph (perhaps specially made) be enough? "Constructive" and "symbolical" are now often interchangeable terms: see, *e.g.*, *Meyerstein* v. *Barber* (1867) L.R. 2 C.P. 38, 48; *Rawlinson* v. *Mort*

Still, the notion of constructive delivery is more easily stated than understood. Although we use here the words "delivery" or "transfer," much divides an actual transfer from the constructive kind. In a manual delivery of (say) a watch, the donee is so completely put in control that the donor cannot regain the chattel except by (forcibly) taking it back from the donee.[27] On the other hand, a constructive delivery can present very different facts. For example, A may have given B a warehouse-key and therewith the only practical means of getting at the goods; yet A can still stop B at the warehouse and prevent him from using the key. If this happens, do we say that there is "constructive delivery" to B? For if, in one sense, the warehoused goods have been transferred in the one way they are capable of, in another sense the delivery is thwarted by the donor's own acts. Does, then, the mere possession of the key give B a right to the goods? Or may A change his mind, at any rate before B has taken full control? This question is a crucial one, in that it tests the force of constructive delivery in its most sensitive spot. It is, however, also a question which has remained concealed, simply because it has never arisen in this precise form; indeed, in the many cases where constructive delivery was allowed, the donor himself never objected to the donee's taking control; the objection came rather from third parties, usually creditors or residuary legatees.[28] But let us pursue the question and see what the answer is. Suppose we say that B (the donee) has a specific right to the warehoused goods, this right would technically have to rest on either of two grounds. The first would accord B a right to the goods by virtue of his having the key. However, B's right would then be enforced not only without B having obtained physical control of the goods, but more importantly against A's active opposition to B's using the key. Thus, A's delivery of the key becomes nothing more than evidence of his earlier donative intention, but an intention now revoked; and this makes the gap between actual and constructive delivery so wide as to make it unreal to speak of "delivery" in the latter case. A second ground would be to treat the key as giving B a (so-called) constructive possession of the goods. This idea shifts the emphasis from A's donative intention to a new possessory fact, namely, that as between A and B, it is B who now has the better, though still remote, control simply because he has the key. But how significant is this fact, particularly when (as in our example)

(1905) 21 T.L.R. 774, 775; *Dublin, etc.* v. *Doherty* [1914] A.C. 823, 843. However, the distinction between these two types of delivery still remains. See also text at note 60, *infra*.

27 See *Blades* v. *Higgs* (1861) 10 C.B.(N.S.) 713; Branston, 28 L.Q.R. 262.

28 In *Rawlinson* v. *Mort* or *Lock* v. *Heath*, note 25, *supra*, the donor was not unwilling, for he was already dead. Even where a seller first delivers a bill of lading to one buyer but then (fraudulently) sells the same goods to another buyer, he does not really object to either buyer getting the goods in the same way as a revoking donor objects to a donee taking the gift. And see note 36, *infra*.

the real possession of the goods has not changed and when furthermore A actively opposes B's taking control? So whether we use the notions of constructive delivery or of constructive possession, neither ground says anything new. For we are back where we started, and we still have to decide (*i.e.*, make a new legal rule) whether or not B is to have a specific right to the goods, a right against an unwilling or recalcitrant donor. And this decision, it will be observed, is a matter of policy, not a decision that is deducible as a mere matter of fact from constructive delivery or possession; indeed, the word "constructive" only helps to gloss over the obvious truth that no real delivery or change of possession has occurred as well as the truth that we are now faced with the making of a new rule.[29]

Yet the courts often confound these elements of policy and fact. *Ancona* v. *Rogers*[30] is an apposite example, though it has to be attacked for its reasoning rather than for its actual result. D (debtor) borrowed various sums from C (creditor) and executed a bill of sale of some furniture and chattels as security for the loan. The terms of the bill permitted D to retain control of the goods until a demand of payment from C, though in case of default C was entitled to take possession of the goods. Meanwhile D decided to change residence, and arranged with O for the furniture to be removed to a house belonging to X; where the furniture was placed in four rooms. O locked the door of these rooms and took the key. After a fortnight, the lender (C), having demanded repayment, went to X's house and asked for possession of the furniture; but X refused him entry to the house. A few days later, D presented a petition for liquidation. The main issue then became in whose possession the furniture was: was it in O's possession, or in D's or X's, or was it in the constructive possession of the lender (C). At trial it was thought that the goods had remained with D, but a strong Court of Exchequer ordered this verdict to be set aside: they regarded C as the possessor of the goods.[31] On appeal, however, judgment was reversed. It was

[29] Of course, where the donee actually takes possession, there is delivery in a real sense. An interesting example was *Gough* v. *Everard* (1863) 2 H. & C. 1, where E sold G timber on E's private wharf. G took the key and control of the wood, and E ceased to occupy the wharf. E went bankrupt, so that the question of G's possession arose under the Bills of Sale Act, 1854. It was held that G was the real and apparent (as distinct from the merely formal) possessor. G was in full control of the timber and had sold part thereof. Baron Bramwell, indeed, thought the expression "apparent possession" a remarkable one, "for, as possession is itself a thing which appears, I do not see how the 'actual possession' and the 'apparent possession' can be in different persons": 2 H. & C. at 11. In other words, this was no longer a situation of constructive delivery by key, simply because G had *obtained* the possession of the timber, at any rate such possession as the subject-matter was capable of. Yet it is often said that G's possession depended on the key: *Hilton* v. *Tucker* (1888) 39 Ch.D. 669, 676; *Wrightson* v. *McArthur and Hutchisons (1919), Ltd.* [1921] 2 K.B. 807, 816–817; *Thomas* v. *Metropolitan Housing Corp.* [1936] 1 All E.R. 210, 214.

[30] (1876) 1 Ex.D. 285.

[31] *Ibid.*, at 286n.

held that O ceased to be bailee of the goods and if he kept the key he had done so as agent for D. Further, it was held that X was not the possessor because he had ceded the possession of the rooms to D; even if he did obtain possession, he held the goods merely as D's bailee. As for the lender, "the demand made by [him] requiring [X] to deliver up the goods, assuming [X] to be the bailee of the goods, had [not] the effect of taking the possession of the goods out of [D]."[32] Now it is necessary to observe that, though the case had to do with a debtor's insolvency and the priority of debts, its reasoning revolved around the possessory point, that is to say, as if no execution creditor had intervened and as if the assignor (D) had merely tried to prevent the creditor (C) from taking the goods. On this basis, the problem came to this: why was C not treated as a constructive donee; and what would his position have been had D given C the key instead of a bill of sale? According to some intimations in the case, the delivery of the key would have made C a constructive possessor of the goods.[33] Yet this at once suggests the question why a key should have more force than an assignment of goods as security for a loan. Admittedly, a key can open doors, something no document can do. But the purpose of this transaction was not (as distinct from pawn or pledge) to give the creditor immediate physical control, but to secure the goods in case of a subsequent default. Hence the relevant question was not what C could physically do with a key, but what security he was entitled to have. As we have moreover seen, in *Rawlinson* v. *Mort*,[34] the parishioner's transfer of certain informal documents was held to effect a constructive delivery to the organist. And this brings out a major conflict in the law. On the one hand, we seem to be told that a key not only can, but that *only* a key can, effect a constructive delivery of big and bulky goods, even where the donor opposes the donee's taking possession.[35] On the other hand, while a documentary transfer to the organist was regarded as good enough, the documentary transfer to the lender failed. Clearly, it is difficult to understand why the letter and receipt (in *Rawlinson* v. *Mort*) should have greater force than the written assignment (in *Ancona*

[32] *Ibid.*, at 292–293, *per* Mellish L.J.

[33] *Ibid.*, at 290–292.

[34] (1905) 21 T.L.R. 774. It may be noticed that Bray J. suggested another ground, according to which the organist was already in possession of the site of the organ so that no delivery at all was needed on the principle of *Kilpin* v. *Ratley* [1892] 1 Q.B. 582, shortly to be discussed. However, there can be little doubt that the decision would have been the same on the broader ground that the documentary transfer completed the gift; and this is the remarkable feature of the case.

[35] So impressed are the courts with the possessory power of the (one) key, that the retention of a duplicate will not apparently amount to delivery: *Dublin City Distillery, Ltd.* v. *Doherty* [1914] A.C. 823, at 843; but *cf. Hilton* v. *Tucker* (1888) 39 Ch.D. 669; and see on this matter, Barlow, *loc. cit.*, 401–403. The argument is, of course, that only one key can give exclusive physical control, but the argument is somewhat misleading since the donor can always forestall the donee's taking the goods until the latter has taken full control.

v. *Rogers*), or why a gratuitous donee (the organist) should acquire an advantage denied to a creditor trying to secure a debt.[36]

More About Constructive Delivery

We come to a second type of constructive delivery, of which the main feature is that the donee is already in possession of the chattel either solely or jointly with the donor. What becomes of the delivery-requirement now? In particular, must the bailee return the chattel and have it formally redelivered to him? To ask for such redelivery seems unpractical and absurd; and such was the view in *Kilpin* v. *Ratley*,[37] now the leading case. Mrs. R. had some furniture in her house which belonged to her father. On a visit, the father pointed to the furniture and said: "I give you [Mrs. R.] this furniture; it will be something for you." This was held a sufficient delivery, because the donor, using words of present gift, left the donee in possession of the things, and also because the donor could not be expected to take back the furniture in order to re-deliver it. Nor was it necessary for the father to handle or touch the chattels when uttering his donative words; his mere pointing at the furniture was sufficient.[38] If convenient, this rule was by no means accepted in previous law. For example, in *Shower* v. *Pilck*,[39] A who resided with B, his daughter-in-law, said "I will give you all my silver-plate" then in the possession of B. No delivery of any portion of the plate took place, and after A's death his legatee claimed the goods. The court rejected the argument that no delivery was necessary if the chattel was

[36] One may, perhaps, object that this contrast between *Ancona* v. *Rogers* and *Rawlinson* v. *Mort* is too forced, since as a matter of actual decision one case was concerned with the priority of debts and the other with constructive delivery to the organist. But this objection would miss the basic point. For, technically and formally, the principle is, in both cases, assumed to be exactly the same; indeed, regarding the delivery-requirement it matters nothing whether the disputing party is the donor himself, a creditor, a second purchaser, or a legatee. The above confrontation, of course, shows that the law can bring forth absurd results, but shown it must be.

[37] [1892] 1 Q.B. 582. See also, *Cain* v. *Moon* [1896] 2 Q.B. 283, at 289; *Re Stoneham* [1919] 1 Ch. 149; J. Williams, *Personal Property* (18th ed., 1926), 75; Mechem, *loc. cit.*, 364–374; Pollock, (1890) 6 L.Q.R. 446, at 449.

[38] [1892] 1 Q.B. at 586: "[It] was not necessary that [the donor] should go through the mere formality of handling the furniture in order to complete the gift." It is interesting that it was still possible to entertain the idea, though it was refuted, that the donor could not merely point at the goods, but had to do something manual or more.

[39] (1849) 4 Ex. 478; *sub nom. Sharr* v. *Pilch*, 19 L.J.Ex. 113. The earlier law had been that an owner of chattels could verbally release his rights to a bailee or disseisor: see Ames, "The Disseisin of Chattels," *Select Essays*, iii, 541, 555 *et seq.*; Pollock, (1890) 6 L.Q.R. 446; and note 42, *infra*. In the eighteenth century, however, the courts began to think more strictly in terms of actual delivery. Thus, in *Smith* v. *Smith* (1733) 2 Stra. 955, the donor lodged with the donee; it was ruled that "a parol gift, without some act of delivery, would not alter the property"; but the donee proved that the (deceased) donor used to leave the key with him when going out of town, which was adjudged a "mixed possession" and the jury held for donee.

with the donee.[40] Indeed, this adamant decision left its mark on a later case.[41] A donor verbally gave a barge to his son who had been in possession and had operated the barge as a servant. To constitute the son a donee and to by-pass *Shower* v. *Pilck*, two distinctions were made: one that the son, being a servant, was in a special position; another, that there had been some change of possession, since the donee not only continued to work the barge but began to pay the crew's wages on his own account. However, these distinctions no longer hold[42]; and the modern rule frankly admits that no redelivery is needed where a donee is already in possession.[43]

In the third and last type of constructive delivery, the transfer consists of the donor's change of status by becoming a bailee for the donee. This idea of change was imported from sale of goods where it originated in connection with section 17 of the Statute of Frauds. The section required certain contracts to be in writing unless the buyer had accepted part of the goods sold and actually received the same; but receipt implies delivery, so that verbal bargains remained unenforceable except by delivery to, or removal by, the vendee.[44] Not before *Elmore* v. *Stone*[45] was this obstacle

[40] The headnote cryptically states: "mere verbal gift of a chattel to a person in whose possession it is, does not pass any property to the donee." For another aspect of this case, see note 43, *infra*.

[41] *Winter* v. *Winter* (1861) 4 L.T.(N.S.) 639.

[42] The test of the servant was disapproved in *Cain* v. *Moon* [1896] 2 Q.B. 283, at 289; and the test of change of possession in *Re Stoneham* [1919] 1 Ch. 149, at 156. The phrase "change of possession" had a curious run. First used as equivalent to delivery from donor to donee (*cf. Irons* v. *Smallpiece* (1818) 2 B. & Ald. 551), it was then thought that change of possession could only be evidence of the donor's intention (and donee's acceptance of a contract) to make a gift: *Re Harcourt* (1883) 31 W.R. 578, 580; *Re Ridgway* (1885) 15 Q.B.D. 447, 449; *Winter* v. *Winter* (1861) 4 L.T.(N.S.) 639, 640. In short, change of possession first meant actual delivery, but then meant evidence of a contract of gift. The idea that certain gifts (especially where donee was already in possession) could be made by agreement rather than by delivery seems as old as Touchstone: see Ames, *loc. cit.*, *Select Essays*, iii, 556.

[43] One limitation, however, remains. In *Shower* v. *Pilck*, the donor used future words of gift. "To pass the property," said Alderson B., "there must be both a gift and a delivery: here there is hardly a gift, for the words are in the future tense." In one respect, the distinction between present and future words of gift is valid enough. Where a donor says "I give presently," he means the donee to have the things immediately and for good; where he says "I shall give," he may wish to retain some (unspecified) rights of user in the meantime: see, *e.g.*, *Re Ridgway* (1885) 15 Q.B.D. 447, at 450. And since the law only allows the creation of an absolute interest in chattels (apart from bailment, hire, pledge which do not now arise), words *de futuro* can at best only postpone the gift. Yet even granting this, why should the distinction apply to cases where a donor is already dead and where the occasion for any reservation in the gift is gone. Suppose a donor says "I will give you my silver-plate next month." He may revoke before the operative date, but what happens if the donor never tries to revoke at all. Is the gift to be nugatory only because he once used future words? Can one not say that the future words have become present words, particularly when, during the relevant time, the donative intention was clearly maintained?

[44] In England, this requirement is now abolished by the Law Reform (Enforcement of Contracts) Act, 1954. *Cf.* (1954) 70 L.Q.R. 441; 17 M.L.R. 451. For receipt implying delivery, see *Saunders* v. *Topp* (1849) 4 Ex. 390, at 394; *Marvin* v. *Wallis* (1856) 6 El. & Bl. 726, at 733.

[45] (1809) 1 Taunt. 458. For some earlier attempts, see *Chaplin* v. *Rogers* (1800)

met. The defendant, having verbally bought some horses, requested the seller to keep them at livery for him. Mansfield C.J. regarded this a clear instance of a constructive delivery, because the buyer having left the horses at livery, the seller "possessed them from that time, not as owner of the horses, but as any other livery stable keeper might have them to keep."[46] Subsequent cases diverged from this doctrine by insisting that a vendor's change of status to that of bailee depended primarily on his having distinctly waived his lien on the goods for the purchase-price yet unpaid.[47] Later again, however, the cases returned to the earlier doctrine marked out by *Elmore* v. *Stone*. Thus, in *Castle* v. *Sworder*[48] the defendant verbally bought on credit some brandy and rum which were to remain in the seller's warehouse, though the buyer could take them when he thought fit. The seller set aside certain specified puncheons and hogsheads, and sent the buyer an invoice indicating the appropriation. After the credit expired, the seller's traveller called with the account when the buyer asked whether the seller would not take the goods back or sell them for him. The Exchequer Chamber took this as evidence of the seller's status having "been converted into a possession as agent for the buyer."[49]

How does this tie up with gifts? More precisely, can a gratuitous donor, without delivering the thing, change his status from owner to bailee? Joshua Williams thought that he could, though he admitted that it had nowhere been so held.[50] This lack

1 East 195n.; *Anderson* v. *Scott* (1806) 1 Camp. 235n.; *Hodgson* v. *Le Bret* (1808) 1 Camp. 233; *Hurry* v. *Mangles* (1808) 1 Camp. 452. For full discussion, see Blackburn on *Contract of Sale* (3rd ed., 1910), 27 *et seq.*

[46] 1 Taunt. 458, at 460. The further remarks are instructive: "[There] are many cases of constructive delivery, where the price of goods may be recovered on a count for goods sold and delivered, instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is, that the key of the warehouse is delivered, or a note is given addressed to a wharfinger . . . although no transfer of the local situation or actual possession takes place" (*ibid.*).

[47] *Cf. Howe* v. *Palmer* (1820) 3 B. & A. 321; *Tempest* v. *Fitzgerald* (1820) 3 B. & A. 680; *Carter* v. *Toussaint* (1822) 5 B. & A. 855; *Baldey* v. *Parker* (1823) 2 B. & C. 37; *Smith* v. *Surman* (1829) 9 B. & C. 561; *Maberley* v. *Shepherd* (1833) 10 Bing. 99; *Holmes* v. *Hoskins* (1854) 9 Ex. 753. See Blackburn, *op. cit.*, 30 *et seq.*

[48] (1860) 5 H. & N. 281; 29 L.J.Ex. 235; (1861) 6 H. & N. 828; 30 L.J.Ex. 310. And see, to same effect, *Marvin* v. *Wallis* (1856) 6 El. & Bl. 726; *sub nom. Marvin* v. *Wallace*, 25 L.J.Q.B. 369.

[49] 30 L.J.Ex. 310, at 312. Hereby a unanimous decision of the Exchequer of Pleas was reversed by a unanimous decision of the Exchequer Chamber. But *cf. Dublin City Distillery, Ltd.* v. *Doherty* [1914] A.C. 823 (a case of pledge where *Castle* v. *Sworder* was distinguished).

[50] J. Williams, *op. cit.*, 73–75. Williams suggested two specific cases of such change: (i) Gift of a horse, donor to keep and donee to pay for its keep. The analogy is with *Elmore* v. *Stone*, note 54, *supra*, but is contradicted by no less a decision than *Irons* v. *Smallpiece* (1819) 2 B. & A. 551 where not only very similar facts occurred, but the same suggestion was made, and where actual delivery was held essential for a gift. (ii) Donor remaining in possession, but permitting donee to exercise acts of ownership over the gift. Here, no doctrine of change of status is required, since the situation is covered by

of authority is not altogether strange, for in the usual case of a gift, it would be most unlikely to witness the so-called change of status or possession that take place in sales; unlikely, because a donor would hardly bail the horse to the vendor as in *Elmore* v. *Stone*, because if he wanted to reborrow the horse he would certainly postpone his gift; nor would he adopt commercial procedures such as in *Castle* v. *Sworder*, because we do business in different manner and with different things than we make gifts. Are there any other ways in which a donor could become a bailee? Suppose that A verbally gives B his old watch, but instead of delivering it, puts it in a special drawer marked (say) "Gifts Out" or "For B." Does this act convert A into a bailee, so that B obtains a right to the watch? The answer must, surely, be No. The reason is that A's act would not even amount to a *donatio mortis causa*, though "inchoate" delivery has there a much wider effect than in an *inter vivos* gift.[51] Yet, varying the example, suppose that a donor says "I now hold this watch as bailee for B." Judged by the rule obtaining in sale, this would have to be an effective change of status, the more so because the conversion is express and no longer inferred from surrounding facts. But as applied to gifts, this produces curious results. To say "I become bailee, etc.," would constitute a binding gift, whereas more direct words such as "I now give" vanish into thin air. Indeed, a purely verbal process called changing status would acquire validity as a gift, without the slightest attempt at delivery being made; but A's putting aside the watch (our previous example), something which is at least a step towards constructive delivery or possessory change, would remain a nugatory act. Clearly, whatever "formal" difference these situations have, in terms of substance or content that difference is nil.

Though there is no actual decision of a donor changing to bailee, *Cochrane* v. *Moore*[52] presents the very similar instance of a donative statement being construed as a declaration of trust. The story is important. One, Benzon, owned a horse called Kilworth kept at the stables of a trainer. Kilworth was ridden by Moore, but because of an accident was not declared the winner. On the same day Benzon verbally gave to Moore one undivided fourth part of the horse which Moore accepted. Benzon subsequently wrote to the trainer telling him of the gift to Moore. Then Cochrane entered upon the scene. He lent some £20,000 to Benzon on the security of the latter's horses, Kilworth among them. When discussing the list of horses to be included in the bill of

Gough v. *Everard*, note 29, *supra*. Moreover, unlike the sales cases, no change of possession will be inferred. Thus, in *Re Ridgway* (1885) 15 Q.B.D. 447 (where a father laid aside a pipe of wine for his infant son, known in the family as the son's wine), it was held that the father did not intend to make a gift, let alone become a bailee.

51 For this point, see *Re Wasserberg* [1915] 1 Ch. 195, 202–203.

52 (1890) 25 Q.B.D. 57.

sale, Benzon told Cochrane of Moore's interest in Kilworth, and Cochrane undertook that this interest should be "all right." Thereupon, Benzon completed the execution of the bill. The Court of Appeal, as we all know, had much to say on the paramount necessity of delivery in gifts; nevertheless, they adopted a trust-method to protect Moore. For "what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane, *constituted the latter a trustee for Moore of one-fourth of the horse.*" [53]

The italicised words contain perhaps the most significant aspect of the case. How did Cochrane become a trustee for Moore? Obviously, by agreeing to take Kilworth subject to Moore's undivided share. But what kind of interest did Moore acquire in the first place? Having no legal right, as there was no complete gift, all he could have was an equitable interest. How did this equitable interest arise? The answer is that Benzon's verbal giving amounted to a declaration of trust, with Moore as beneficiary of the undivided fourth. And if there was a trust, Cochrane was bound by it, whether he said "all right" or not, provided he had notice of the trust. Furthermore, the result must have been the same if Benzon had given the whole horse to Moore and even if the trainer had not been notified of the gift, for this, if no other, reason that the subject-matter of a trust is not confined to undivided shares but extends to land and chattels.[54] In other words, the practical lesson is that we can obviate the requirement of delivery in *inter vivos* gifts by a declaration of trust; and, indeed, by a declaration which, in spite of what the books might say, can be made without a formal change of status, that is, without such explicit words as "I am now trustee." [55]

Review and Critique

Reviewing finally the law as a whole, what becomes of the famous delivery-rule? The short answer is that it has no consistent design. Taken singly some results seem practical and clear, but *en bloc* the pattern is fragmentary and confused. The following points will show this in full. To begin with, only a small part of the rule is clear. We know that as regards small or portable things (*e.g.*, a watch), both gift and pledge require an actual delivery to the donee or pledgee. No modern theory satisfactorily explains why this should be so, though there is the consolation that such has

[53] *Ibid.*, at 73, *per* Fry L.J.

[54] The Court of Appeal refused to consider whether "the undivided fourth part of the horse admits of delivery," or whether it is "incapable of tradition," or whether Benzon's letter to the trainer was "either a constructive delivery of the undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits." (*Ibid.*, at 73.)

[55] The accepted rule is, of course, that a declaration of trust cannot be created without express or formal words. *Cf.* Nathan's *Equity Through the Cases* (3rd ed., 1955), 79–80; (1956) 19 M.L.R. 237, at 242.

long been the law. When, however, we grapple with bulky or non-portable things, there is not even elementary clarity. We realise that actual transfer is now impossible or impracticable and that a substitute for manual delivery had to be found. The substitute has been called "constructive delivery," but we are still uncertain as to how exactly this should operate. The law has endowed constructive delivery with a sort of factual quality as though it involved some real possessory change, and this idea constantly recurs in the paradigm of the key; but, in our hypothetical test-case (where a donor, after handing over the key, then actively prevents the donee's taking possession), we saw that the concepts of constructive delivery or possession solve nothing at all.[56]

Or take the other types of constructive delivery which apply to both big and small things. How can one reconcile the result in *Kilpin* v. *Ratley*[57] with what (we were told) was the chief reason for requiring delivery, namely, to bestow an evidentiary or pragmatic safeguard on the unwary donor. But where the donee is in possession, he may be equally tempted, if not more, to fabricate a story that a gift has been made to him. We arrive at this paradox: on the one hand, it appears absurd to insist on a new delivery; on the other, the donor's situation is such as to make the "wrench" of redelivery very desirable indeed.[58] Again, observe the wider problem posed by *Cochrane* v. *Moore*.[59] After much ado about the requirement of delivery, and its solid lineage, the court finally permitted the owner to change status, and a donative statement became operative as a gift without there being any delivery, whether complete or inchoate. Though that change was from donor to trustee, and not from donor to bailee, the difference is an insignificant one, since the donee still acquired an effective right, except a

[56] Properly speaking, the means of access given by the key is just a licence to take the goods, though one which is both verbal and coupled with a physical act. This licence has, however, certain collateral effects: (i) if the donee takes the goods while the licence is unrevoked, this will constitute delivery to him; (ii) the donee, though the goods are with donor, may possibly have an action of trespass and (apparently) also trover against a wrongdoer. This produces an interesting contrast between Roman and English law. In the former, Justinian made a voluntary gift irrevocable, even without delivery, entitling the donee to call upon donor for delivery, but not conferring on him any rights against third persons; the English result is the exact opposite. See Pollock (1890) 6 L.Q.R. 446, at 448–449.

[57] [1892] 1 Q.B. 582.

[58] Mechem's explanation of this (*loc. op.*, 365) is not too convincing. He argued that the "very logic [of the pragmatic approach] demands that exceptions be admitted where necessary," but the necessity for the exception is left unexplained. For, though the requirement of possession is fulfilled, the real safeguard, *i.e.*, the "wrench of delivery," goes by default. That such a safeguard may sometimes be appropriate is shown by *Re Stoneham* [1919] 1 Ch. 149. A, in 1913, verbally gave B some furniture situated in A's residence but occupied by B. A confirmed this gift in his will, but in 1914 an "incident" occurred when A allegedly changed his mind. There was serious doubt as to whether the donor had latterly intended the gift. In the circumstances, the gift was held valid because of the donee's appointment as executor and the confirmation in the will.

[59] (1890) 25 Q.B.D. 57.

right which, being equitable, could be squeezed out by a bona fide purchaser without notice. One can broadly say that *Cochrane* v. *Moore* epitomises the basic uncertainty of the law. In some respects, the delivery-requirement still tends to be strict (hence the need to hand over small things as well as repeated talk of the key); yet in other respects the requirement has been considerably relaxed, at least from a purely practical point of view. A final example will show this hiatus in another way. Suppose that A, in London, wishes to give B his watch which is in York. A apparently has to travel North to enact a personal delivery to B. But suppose that what A wants to give B is a big and bulky clock also in York. A can now effect a constructive delivery, by giving (say) the necessary key to B. The consequence is that while the small thing requires a special journey, the big thing can be "transferred" at home. Can we avoid this result? Let us suppose that both things are in the same room at York to which A gives B the key. The watch is here as little manuable by being inaccessible as is the clock by being bulky. However, even in this case A seems able to revoke the gift of the watch, though he cannot revoke the gift of the clock. And the reason why he can revoke the one, but not the other gift, is simply this, that constructive delivery is not meant to be a labour-saving device, but is meant to be a substitute for the actual delivery of non-manuable goods.[60] Yet if our measure is practical results, there is clearly something very wrong about all this. The simple truth, then, is that the law is split into divergent and disconnected rules. They are nominally kept together by something called "delivery," though delivery which can be actual delivery, semi-manual delivery, constructive delivery or no delivery at all. Is it not astonishing how unaxiomatic a legal axiom can be?

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[60] More technically, there are two reasons why the donor can or cannot revoke this gift. First, the gift is an *inter vivos* and not a *mortis causa* one, and it is only in the latter that delivery by key has been extended to portable things such as bonds and deposit books: *Re Wasserberg* [1915] 1 Ch. 195. Between *inter vivos* and *mortis causa* gifts, the difference moreover is just this, that in the latter the donor dies leaving his donative intention unrevoked, whereas in the former he does revoke. Secondly, there is the distinction between constructive and symbolical delivery (see note 26, *supra*), according to which the transfer of the key would be an effectively constructive delivery only in the case of the clock, since this is (as we assume) a big and non-manuable thing. In the case of the watch, the key would probably be a mere symbol and hence a worthless delivery.

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REFORM OF THE LAW OF LARCENY: AN URGENT TASK

QUOTING with approval a critical note in the *Law Quarterly Review* on the case of *Moynes* v. *Coopper*[1] which emphasised the utter unreality of the present law of stealing and described it as a public scandal, Lord Goddard has recently let it be known that he believes "it would be a good thing . . . if the law of larceny could be somewhat simplified and cleared up."

The case which evoked this comment by the Lord Chief Justice was *Russell* v. *Smith*,[2] where a lorry driver employed by a firm of haulage contractors was held by the magistrates not guilty of stealing, but on a case stated it was held by the Divisional Court that this was wrong and that the case was proved. The accused, Smith, was instructed by his firm, X, to collect from another firm, Y, and deliver to Z one ton of feeding stuffs, and by an error on the part of Y eight sacks too many were loaded onto the lorry. Although Smith had arranged the load, he did not know that he had more sacks than he should have had until the time of delivery, whereupon he decided to appropriate the excess for himself.

The magistrates held that there was no "taking" sufficient to amount to larceny, since the "taking," in their opinion, took place at the time of the loading of the eight excess sacks, and at that time the respondent did not have the intent permanently to deprive the owner thereof. Accordingly, they dismissed the information. The Divisional Court, consisting of Lord Goddard C.J., Slade and Gorman JJ., held, however, that there was a "taking" of the sacks within section 1 of the Larceny Act, 1916, when Smith first discovered that he had the sacks, and decided to appropriate them. He must have known that they were never intended to be given to him.

In reaching this decision the court followed the decision in *R.* v. *Hudson*[3] and explained the decision in *Moynes* v. *Coopper*.[4] The court repeated what was said in the latter case concerning the reason why *Hudson's* case was decided as it was, *viz.*, that there neither the cheque nor the envelope was intended by the sender for the accused—which could not be said on the facts of *Moynes* v. *Coopper*. Similarly, in the present case, the eight sacks were not intended to be put into the respondent's lorry: they were not intended to be delivered to the consignee when the rest of the property was delivered. "The taking took place when this man discovered

[1] [1956] 2 W.L.R. 562. See (1956) 72 L.Q.R. 183.
[2] [1957] 3 W.L.R. 515. The comment is at p. 518.
[3] [1943] K.B. 458.
[4] *Loc. cit.*, note 1.

that he had the sacks, which were never intended to be given to him and which he must have known were never intended to be given to him, except in the sense that they were put on the lorry by mistake."[5]

In so holding, the court accepted the view expressed by Cave J. in *R.* v. *Ashwell*[6] to the effect that a man cannot be regarded as taking a thing until he knows what he has got, a view to which Lord Coleridge also subscribed. In addition, a passage from Stephen J.'s judgment, which had been quoted (out of context) in *R.* v. *Hudson*, and repeated in *Moynes* v. *Coopper* without this fact being observed (or the fact that Stephen J. was one of the seven judges against convicting Ashwell[7]) is again cited inappropriately.

This decision appears to be consistent with those decisions of the courts which have endeavoured to make the law of larceny wide enough to punish essentially dishonest conduct even where this has involved some straining (or violation) of the strict doctrine of possession on which the law of larceny is supposed to be based. The courts have never been prepared to let such dishonest conduct go unpunished if there has been some way of rationalising the decision in a way which did not appear to be inconsistent with the law. Unfortunately, in *Moynes* v. *Coopper*, no such solution was available, and dishonest conduct was held to be no offence. This was because in that case there was no doubt that the taker was intended to receive the money in the wage-packet, and there was not present any question concerning the lack of authority of the wages clerk or mistaken identity on which the court could fall back, as in *Middleton*.[8]

In view of this tendency on the part of the courts to find ways of punishing essentially dishonest conduct where that is possible, it may well be inquired what remains of the case for reform of the law of larceny. It is conceived that the case rests on the following grounds:

1. These judicial devices, when employed, operate at the expense of the doctrine of possession. This would appear to be rather an academic objection, and in itself insufficient ground for urging reform.

2. Such devices cannot always be found so as to ensure that all dishonest appropriation is punished. Examples of cases which reveal gaps in the criminal law are *Moynes* v. *Coopper*, *R.* v. *Jones*[9] and *R.* v. *Dent*.[10]

3. Sometimes, of the various devices available, that one is chosen which perpetuates the least acceptable rationalisation. For example,

[5] *Loc. cit.*, p. 522.
[6] (1885) 16 Q.B.D. 190, 203.
[7] See the writer's note on the latter case (1956) 19 M.L.R. 518.
[8] (1873) L.R. 2 C.C.R. 38.
[9] (1949) 33 Cr.App.R. 11. But the courts appear to have stopped the gap in *R.* v. *Ingram* [1956] 3 W.L.R. 309.
[10] [1955] 3 W.L.R. 297.

following the trespass/felony rule suggested by *R.* v. *Riley* [11] in the case of *Ruse* v. *Read* [12] and the recent case of *R.* v. *Kindon.*[13]

4. These devices lead to undue technicality in the law of larceny, and great uncertainty about the law, which in turn leads to what the *Law Quarterly Review* describes as " the serious waste of judicial time . . . in the discussion of legal subtleties." [14]

5. Other countries have found acceptable solutions of these problems by developing a composite offence entitled Theft which eliminates the necessity of employing artificial devices by enabling all essentially dishonest appropriations to be punished as theft.

It may be of some interest to give examples showing what has been achieved in this direction by other jurisdictions. These are included in an Appendix to this article. Stephen's account of the provisions of the Draft Criminal Code of 1879 is quoted briefly. This precedes an excerpt from the new Canadian Criminal Code of June, 1954, which may be compared with the provisions of the Nyasaland Protectorate Penal Code in 1955.[15] There follows a brief quotation from Tentative Draft No. 2 of the American Law Institute's Draft Model Penal Code, from which it will be seen that the Code has as its basic feature the unification of the theft offences. For reasons of space, only the barest outline of these provisions can be included, and it is not suggested that these do more than indicate the possibilities of reform. It is appreciated that there may lurk within these provisions some difficulties or snags from the standpoint of English law, and particularly with regard to such matters as the transfer of title to property. But it is surely not impossible to conceive that a solution to such difficulties could be found, given the necessary vision and determination. It is submitted that the time has come to look again at the absurdly complicated provisions of the English law relating to larceny and kindred offences. The Larceny Act, 1916, as Lord Goddard has more than once remarked, did no more than consolidate and codify the law. What is needed is to overhaul it completely. There is a strong case for this to be treated as a matter of urgency. It is at least as important as the reform of the rule against perpetuities. The rules are older and even more antiquated and outmoded.

J. E. HALL WILLIAMS.*

[11] (1853) Dears.C.C. 149.
[12] [1949] 1 K.B. 377.
[13] [1957] Crim.L.R. 607.
[14] *Loc. cit.*
[15] See also The Criminal Code of Nigeria, 1948 Revision, s. 383; the Penal Code of Uganda Protectorate, 1950, s. 245; the Penal Code of Northern Rhodesia, 1951, s. 236. These sections are substantially identical with that for Nyasaland quoted in the Appendix. It is remarkable that while the United Kingdom has herself eschewed any general codification of the criminal law, it has given such excellent codes to the colonial territories.

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Appendix

1. Stephen's *History of the Criminal Law of England*, Vol. III, pp. 163–164.

Theft itself was defined (by the Criminal Code Commissioners) as "the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person anything capable of being stolen, with intent to deprive the owner permanently thereof, or to deprive any person having any special property or interest therein permanently of such property or interest." This would have cut away all the technical distinctions . . . as to the necessity for a felonious taking, and have substituted a distinct and simple principle, requiring little explanation or illustration, and reasonable in itself, for a principle so unreasonable in itself as to have been practically eaten up by exceptions inconsistent with it.

2. *Canadian Criminal Code*, 1954 (2 & 3 *Eliz.* 2, *c.* 51).

Title Theft:

§ 269 (1). Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,

(a) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of his property or interest in it,
(b) to pledge it or deposit it as security,
(c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or
(d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(4) For the purposes of the Act the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

(5) For the purposes of this section a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity.

3. *Nyasaland Protectorate Penal Code*, as at December 31, 1955, Division V, Offences Relating to Property, Chapter 26.

§ 256 (1). A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof, anything capable of being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;
(b) an intent to use the thing as a pledge or security;
(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
(d) an intent to deal with it in such manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

The term "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

4. *The American Law Institute's Model Penal Code*, Tentative Draft No. 2, May 3, 1954, p. 58.

A basic feature of the draft is the unification of the theft offenses. The traditionally distinct crimes of larceny, embezzlement, obtaining by false pretenses, fraudulent conversion, cheating, extortion, blackmail and robbery are consolidated into one offense called "theft." Unification is desirable because it eliminates pointless procedural obstacles to the conviction of thieves and swindlers.

IS A DISCRETION STATEMENT REALLY NECESSARY?

In a suit for divorce or judicial separation the petitioner's own adultery is a discretionary bar.[1] The petitioner asking the court to exercise its discretion to grant a decree notwithstanding his own adultery must lodge in the Divorce Registry a statement, known as a "discretion statement," dated and signed by him or his solicitor, stating that the court will be asked to exercise its discretion on his behalf notwithstanding his own adultery, and setting forth particulars of his acts of adultery and of the facts which it is material for the court to know for the purpose of exercising its discretion.[2]

This statutory provision expresses a consistent legislative view for almost a century. It is no doubt due to the fact that the State has always shown great concern for the integrity of marriage and as great a reluctance to sever its tie. "In spite of modern legal changes and whatever social developments there have been in recent years, marriage under the common law is still in its essence a voluntary union for life of one man and one woman to the exclusion of all others."[3]

But in spite of the common law, concessions had to be made to cover those marriages which had utterly and completely failed. Nothing less than divorce would meet the popular demand. But great care was taken to make divorce unattainable except in very special circumstances.

It is not the object of this article to criticise the provisions of the various Matrimonial Causes Acts. Its only purpose is to deal with the matter of the "discretion statement," and to examine, in the light of recent cases, whether in this day and age it is serving any useful purpose.

Neither the Matrimonial Causes Act, 1950, nor the Matrimonial Causes Rules, 1950, has laid down the form which a discretion statement should take. As a matter of fact, there is no prescribed form. But the court requires that a discretion statement should be a full and frank disclosure of all acts of adultery committed by the petitioner. The name of the person with whom the petitioner committed adultery and his or her status, *i.e.*, whether married, single, widowed or divorced, must be given. If there is a child or children of the adultery their names, dates and places of birth should be given.

Before proceeding to discuss the uses to which a discretion statement might or might not be put, it would perhaps be interesting,

[1] Matrimonial Causes Act, 1950, s. 4 (2).
[2] Matrimonial Causes Rules, 1950, r. 28 (1).
[3] *Per* Lord Merrivale P. in *Apted* v. *Apted & Bliss* [1930] P. 260.

and quite revealing, to pause for a moment and consider the nature of the information that is required to be included in such a document.

A petitioner, who is in the unfortunate position of having to lodge a discretion statement, has to disclose all acts of adultery which he has committed throughout the marriage which is the subject of the petition. In other words, he has to lay bare his soul regardless of the fact whether the particulars disclosed are relevant to the proceedings or not (and in so many cases they are not).

Not only must he make a frank confession of his sins but, since he is required to divulge the name of every person with whom the adultery was committed, he must also implicate third parties who may have nothing at all to do with the present suit. The implications of this requirement are obvious. The adultery may have been committed many years back. The person with whom it was committed may have forgotten the entire incident or may remember it only as a very regrettable and unpleasant incident in his or her life. That person may have married since and certainly does not wish to have the ghost thus resurrected. All these considerations matter not. The ghost must be resurrected with utter disregard of any possible consequences, which might quite conceivably involve the ruination of another what might, until then, have been a happy marriage.

Furthermore, a petitioner is under an obligation to reveal the names of any children of his adultery, regardless of the fact that such disclosure may serve to brand those children as bastards for the remainder of their lives.

Is there any justification for requiring the petitioner to reveal, in such wealth of detail, his past misdeeds and thus risk involving other parties, who may have nothing at all to do with the case in issue, in scandal?

It is conceded that a discretion statement is required to be lodged with the registrar in a sealed envelope to be opened by the judge at the hearing. This requirement, it might be argued, ensures strict secrecy, thus preventing any harm resulting to third parties. This is perfectly true as far as it goes. But consider the number of persons who are likely to see a discretion statement *before* it is put in a sealed envelope.

It is the duty of counsel for the petitioner to draft the discretion statement. To do so he must naturally be in possession of all the relevant facts which are usually disclosed in conference. Any person who is the least bit familiar with such conferences knows that it is attended not only by the petitioner and his counsel but also by the petitioner's solicitors and/or his managing clerk. This number is often swollen by the number of pupils counsel may have reading in his chambers. These latter may be as many as four or even five at any one time.

The petitioner's position under such circumstances is not, it is submitted, a very enviable one. Is it so very strange, then, that a number of them feel reluctant to disclose their past misdeeds, in all their sordid detail, not because they want to deceive the court but because they simply lack the courage to do so in the presence of so many persons? Very often this lack of courage is interpreted as " contempt of court " with dire results to the petitioner's cause.

After the discretion statement has been drafted it is typed and sent along to the petitioner's solicitors. This process further enlarges the circle of those who are in on the secret, for it brings in counsel's clerk, his typist, and the solicitors' clerks and various other members of their staff.

At this stage the discretion statement is placed in a sealed envelope and lodged with the registrar. But even then a discretion statement is not secure from other eyes; for the Matrimonial Causes Rules, 1950, provide that a discretion statement shall be open to the inspection of the Queen's Proctor. Furthermore, if " an application is made to a registrar by or on behalf of a party who has filed a discretion statement for leave to give his own evidence by affidavit, the discretion shall be open to inspection by the registrar." [4]

But let it be assumed that a discretion statement remains in its sealed envelope and is opened by the judge at the hearing. What happens after the case has been decided, or if there is an appeal? The presumption is that further eyes fall on the now open discretion statement.

It will thus be seen that the number of people who are likely to see and who actually do see a discretion statement is not inconsiderable.

Then again, actual harm might be caused to a petitioner's cause through his having complied with the law by filing a discretion statement. Rule 28 (5) of the Matrimonial Causes Rules, 1950, provides that a respondent may not use the contents of a discretion statement to found a cross-charge against the petitioner unless the latter puts the discretion statement in evidence in open court. " The last words mean that if a petitioner puts the discretion statement in evidence (as he must at some point in the trial), and the case is then adjourned, the respondent may, if sufficient time is available, make use of this evidence to found counter-charges." [5]

The time has now come to pose the crucial question: Is a discretion statement really necessary? Does it, in this modern age, and bearing in mind the harm that it is likely to cause, serve any useful purpose? The advantages must be considerable to warrant the survival of this Victorian instrument of torture, " this miserable document which is called a discretion statement." [6]

[4] Matrimonial Causes Rules, 1950, r. 28 (3).
[5] Tolstoy on *Divorce*, 3rd ed., p. 245.
[6] Bucknill L.J. in *North* v. *North* (1946) July 18 (unreported), C.A.

There is no doubt that during the early days a discretion statement did serve a useful purpose. There were definite rules laid down to guide the court in the judicial exercise of its discretion and, naturally, it was necessary that the court should inform itself of any acts of adultery committed by the petitioner and the circumstances surrounding such acts in order to enable it to decide whether or not the petitioner was entitled to relief in spite of his own adultery. In other words a discretion statement was necessary and served a very useful purpose.

But what is the position now? That the exercise of the court's discretion is not now as strictly circumscribed as it used to be cannot be denied. The grounds on which discretion is at the present day exercised have gradually widened until it can be said with justification that the withholding of the discretion has become the exception rather than the rule.

How has this change come about?

In *Constantinidi* v. *Constantinidi* [7] it was laid down that the list of causes for the exercise of the discretion to grant a decree was not a closed book and might be extended as occasion arose.

In *Evans* v. *Evans and Elford* [8] Sir Gorell Barnes quoted with approval the words used by Vaughan Williams L.J. in *Constantinidi* v. *Constantinidi and Lance* [9]:

> "The court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrongdoer respectively *inter se* but also to the interests of society and public morality."

The advance in the exercise of the jurisdiction of the court is further illustrated by the case of *Wickins* v. *Wickins* [10] in which the Court of Appeal refused to lay down any rule restricting the operation of the discretionary power. This case may be said to mark the termination of the doctrine of defined classes of cases for the exercise of the discretion; and in *Holland* v. *Holland* [11] the Court of Appeal gave authority to what may be termed the modern view that the discretion is unfettered and that rigid rules for its exercise are neither desirable nor possible.

The next period of the decisions may be said to commence with *Wilson* v. *Wilson* [12] where, in recognition of the fact that society had changed, new principles were laid down. In that case, Sir Henry Duke P. mentioned four circumstances which, in his view, warranted the exercise of the judicial discretion in the petitioner's favour. These four considerations were referred to with approval by Lord Birkenhead L.C. when he was sitting in the Divorce Court

[7] [1903] P. 246.
[8] [1906] P. 125, 130.
[9] [1905] P. 253, 270.
[10] [1918] P. 265.
[11] [1918] P. 273.
[12] [1920] P. 20.

and deciding *Wilkinson* v. *Wilkinson and Seymour*.[13] These four points are—

(a) the position and interest of any children of the marriage;
(b) the interest of the party with whom the petitioner has been guilty of misconduct with special regard to the prospect of their future marriage;
(c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and
(d) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably.

This was indeed a big advance in the exercise of the jurisdiction of the court. But it did not stop there and a further advance was made in *Blunt* v. *Blunt* when Lord Simon L.C. had this to say [14]:

> "To these four considerations I would add a fifth of a more general character, which must, indeed, be regarded as of primary importance, *viz.*, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down."

Who can deny that the five considerations listed above and which now govern the exercise of the discretion, have removed any possible grounds on which discretion can be withheld? Who can visualise any circumstance wherein to withhold the remedy prayed for could be considered to be in the interest of a petitioner? Or can anyone really believe that it can, under any circumstances, be argued that it is in the public interest to insist on the maintenance of a union which has utterly broken down?

Few people can find reason to quarrel with these modern principles. They are admirable and necessary in present-day enlightened society. But the point is that these very same principles have made the filing of a discretion statement completely unnecessary because, it is submitted, it no longer serves any useful purpose. The fact that a petitioner was living in adultery at the time relief was prayed for,[15] or that a petitioner had not only not disclosed her adultery but had added perjury to such non-disclosure,[16] did not constitute a bar to relief.

In many cases also, the discretion of the court was exercised in favour of a guilty petitioner whose adultery had not been disclosed until after the intervention of the King's or Queen's Proctor.

At the same time, it is only fair to admit that there are innumerable cases where the court refused to exercise discretion in favour

[13] (1921) 126 L.T. 29n.
[14] [1943] 2 All E.R. 76.
[15] *Wilson* v. *Wilson* [1920] P. 20.
[16] *Pretty* v. *Pretty* [1911] P. 83.

of a guilty petitioner. The famous case of *Apted* v. *Apted and Bliss* [17] comes to mind.

It appears, at first sight, that the court's refusal to grant a decree in this case was in keeping with the intention of the earlier legislators. The petitioner by his marital misconduct had forfeited his claim to relief. This may well have been so in 1930 when the case was decided.

It is worthy of note, however, that the decision in this case was given some thirteen years before Lord Simon enunciated his "fifth consideration" in *Blunt* v. *Blunt*.[18] Of course, it is idle to speculate now whether the result would have been different had the court given consideration to the point that it is "contrary to public policy to insist on the maintenance of a union which has utterly broken down." Again, it is pointless to wonder whether the results would have been the same had the petitioner frankly disclosed in his discretion statement his past conduct, sordid as it was, and had not sought to deceive the court. One is inclined to think that if the petitioner in this case had been frank with the court he would not have been debarred from obtaining the remedy he was seeking. The following remarks of Hill J. in *Stuart* v. *Stuart and Holden* [19] lend encouragement to this conclusion:—

> "It is the condition upon which the court can properly exercise its discretionary power that there should be complete frankness on the part of those who are asking for its discretion. Therefore, even assuming that if all the facts had been disclosed by the petitioner on the hearing when asking for a decree nisi the court would have exercised its discretion in his favour, after the course he has chosen to pursue I am satisfied it is not a case in which the court ought to exercise its discretion."

These words of Hill J. reveal a very disturbing fact which is that the court tends to punish a petitioner, not for committing adultery, but for daring to hide that adultery.

This disturbing fact emerges in almost all the cases in which the court refused to exercise its discretion in favour of a petitioner. It is no exaggeration to say that in only one case discretion was withheld for a different reason. In this case [20] the wife petitioned for the dissolution of her marriage on the ground of her husband's adultery and asked the court to exercise its discretion in her favour in respect of her own adultery. The Commissioner dismissed the petition, refusing to exercise his discretion in her favour since, on the evidence before him, she was the party responsible for the break-up of the marriage. The wife appealed but without success.

At first sight this case seems to prove that a discretion statement does serve a useful purpose. At any rate, that is the impression

[17] [1930] P. 246.
[18] *Supra.*
[19] [1930] P. 77, 78 and 79.
[20] *Moor* v. *Moor* [1957] 1 W.L.R. 927, C.A.

it is likely to create until a further examination of the case reveals that nothing can be further from the fact. It is apparent from Lord Evershed's judgment that had the court been satisfied with the presentation and conduct of the case even the fact that she was the original wrongdoer would not, presumably, have deprived her from relief. This is borne out by the following significant passage from the judgment of Hodson L.J.[21]

> ". . . nor am I seeking to say that in no case can a party, who is the original wrongdoer, rightly appeal to the court for the exercise of discretion."

To sum up, it seems clear beyond a shadow of doubt that the original intention of our legislators was that matrimonial relief in the form of divorce or judicial separation was not to be made available except to those persons who were themselves innocent of adultery. If they were not so innocent they had to explain to the court the circumstances which induced them to commit this matrimonial offence. In this way and for this purpose the discretion statement came into existence. It was for this reason also that a petitioner was required to exercise complete frankness, otherwise the whole purpose of a discretion statement was lost. The judge trying the case would carefully examine the whole circumstances as disclosed in the discretion statement and, guided by very definite and narrow rules, decided whether or not to exercise his discretion in favour of the petitioner.

Today, however, the circumstances are completely different. The courts have systematically refused to be bound by any rules. They wished to remain completely unfettered with the results already shown.

It is not relevant to this article to say whether the attitude taken by the courts in this matter of the discretion is right or wrong. Its object is to accept the facts as they are now and in the light of these facts to endeavour to show that a discretion statement no longer serves any real purpose.

At the commencement of this article it was shown that the burden placed on a petitioner in requiring him, in appropriate cases, to file a discretion statement was indeed a very heavy one and that it could not be justified unless such a statement did really serve a useful purpose. Adultery is not a crime and is not punishable as such. Even so, it is an offence against the social principles which form the basis of our family today. A social stigma attaches to the parties concerned who naturally do not wish to have the finger of scorn or contempt pointed at them. Therefore, it requires great moral courage for a person to disclose the fact that he or she has committed adultery, not once but several times and then go about describing the whole of the circumstances. That certain petitioners

[21] *Supra*, p. 932.

do not sometimes possess the courage to do so is not very surprising. It requires a high degree of moral courage or, perhaps, a higher degree of disregard for social principles, to enable a person to disclose his past moral misdeeds. That such a burden is placed on a petitioner is unjust; but to punish him for not proving equal to shouldering such a burden is intolerable, especially when no good reason can be shown why such a burden is placed on him in the first instance.

Lord Simon's "fifth consideration,"[22] which he himself called of "primary importance," has thrown the door wide open for the favourable exercise of the court's discretion. It can truthfully be said that in no case which comes before the court, particularly if it is undefended, would it be in the public interest to insist on the maintenance of a union which "has utterly broken down." The petitioner's past behaviour cannot, it is submitted, affect the issue. On the contrary, the more deplorable his past conduct, the more it becomes necessary to dissolve his marriage which by then has become a mere mockery.

In a defended case other considerations, of course, apply. Even so, it is submitted that a discretion statement serves no useful purpose. If the petitioner's adultery, as disclosed in the discretion statement, is already known to the respondent, the latter will rely on it and its disclosure in a discretion statement is completely unnecessary. If, on the other hand, the petitioner's adultery is unknown, its disclosure in a discretion statement cannot be of the slightest use to the respondent who cannot rely on it except in certain very special circumstances which do not frequently occur. Moreover, the disclosure of the petitioner's past misdeeds cannot, in most cases, affect the judge's decision in the case because, not being known to the respondent, it could not be said that they conduced to the marital offence charged against the respondent.

There is also a very grave risk that a discretion statement might become "a roguish thing" in accordance with the length of the judge's foot.[23]

That such a danger has already reared its head is illustrated in a recent case.[24] In this case, the wife petitioner in an undefended petition for divorce had been previously married to an American who had divorced her on the ground of adultery. In her discretion statement the wife admitted having committed one act of adultery with one, P., and continued, "save as aforesaid, I have never committed adultery." The trial judge, while finding the wife's case

[22] *Blunt* v. *Blunt, supra.*

[23] Selden, *Table Talk*, *s.v.* Equity, para. 2: "Equity is a roguish thing; for law we have a measure, know what to trust to: Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is Equity. 'Tis all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot." Text amended from the Lincoln's Inn MS.: see the Selden Society's edition, p. 43.

[24] *Coleman* v. *Coleman* [1955] 1 W.L.R. 1235.

proved, criticised her discretion statement as untrue in view of the previous divorce; professed himself not satisfied that there had been only one act of adultery, refused to exercise his discretion, and dismissed the petition.

On appeal, held (1) that in refusing his discretion the judge had given weight to irrelevant and unproved matters, for a discretion statement had reference only to acts of adultery committed during the marriage in suit, and there was no evidence on which he could find that the wife had been guilty of more than one act of adultery: (2) that a decree nisi should be pronounced and the matter referred to the Queen's Proctor for investigation.

Two points concerning this case are worthy of note; first, this question of the petitioner's duty of frankness to the court continually crops up and the tendency of the court now is to punish people, not for their acts of adultery but for failing to disclose such adultery.

Secondly, the fact that the Court of Appeal has reversed the decision in this case is no guarantee that it is in a position to do so in every case. The Court of Appeal might sometimes fail to find sufficient grounds " for substituting for the commissioner's discretion this court's discretion." [25]

In conclusion, it is hoped that this article has succeeded in establishing that there is no longer a case for a discretion statement. Such a statement, if it ever did serve a useful purpose, does not do so now. It imposes a heavy and, quite often, an intolerable burden on a petitioner. It has already become a " roguish thing " and ought to be abolished before it can do further harm.

N. Simon Tessy.*

[25] *Moor* v. *Moor, supra.*

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LEGISLATION

The Maintenance Agreements Act, 1957

Married people who make separation and maintenance agreements (and, of course, their legal advisers) have been selected as the first to benefit from legislation resulting from the recommendations of the Royal Commission on Marriage and Divorce.[1] This may be because the problems arising from the decision in *Bennett* v. *Bennett* [2] lent themselves to a short amending statute for which parliamentary time could be found. It may be coincidental that the recommendation that such agreements should be binding originated with the General Council of the Bar [3] and received no particular support from other witnesses.

In brief, the Maintenance Agreements Act [4] provides that when a maintenance agreement has been made with a view to a husband and wife living separately, the parties shall be bound by the terms of such an agreement, except for any restriction it may contain on the right to apply to a court in regard to financial arrangements included in or omitted from it. Any such provision is to be void, and the courts are empowered to vary the financial provisions in agreements if circumstances change or if proper financial provision has not been made for any child of the marriage.[5] No such variation is, however, permissible if the agreement is made more than six months after dissolution or annulment of the marriage, even in the interests of the children.[6]

The Act itself provides that it shall come into operation on August 18, 1957,[7] and shall not affect any sum payable under the agreement before that date, but it is not so explicit as to the precise range of its application. The question of what is proper provision

[1] Cmd. 9678, 1956.

[2] [1952] 1 K.B. 249, C.A.

[3] Minutes of Evidence before the Royal Commission on Marriage and Divorce, Paper No. 5, p. 43, paras. 15–16. The recommendation appears in the second memorandum of evidence submitted by the Bar Council, but as the Council agreed (Paper No. 4, p. 27, of Minutes of Evidence para. 1) its approach to the specific questions was affected by its views on the causes of the breakdown of marriage and remedies therefor. An interesting example of these views appears in the section in "Divorce-mindedness" (Paper No. 4, p. 28, paras. 7–10), with its unsubstantiated denigration of the present generation and nostalgia for the golden age when young people "heeded the counsel of their elders," para. 8).

[4] 5 & 6 Eliz. 2, c. 35.

[5] Interpreted to mean any child of both parties to the marriage, whether or not born in lawful wedlock, and any child adopted by both parties to the marriage: s. 1 (6) (*b*).

[6] The jurisdiction of the court may in any event only be invoked by an application by either party to the agreement: s. 1 (3).

[7] One month after the date of its passing, *viz.*, July 17, 1957; s. 3 (2).

for a child of the marriage is clearly one appropriate to the exercise of judicial discretion in the light of all the circumstances, and the only difficulty is to justify its exclusion when the agreement is made more than six months after the end of the marriage.[8] But the change of circumstances sufficient to allow application to the court for variation of the financial provisions is not precisely defined. There must be "a change in *the circumstances in the light of which any financial arrangements* contained in the agreement *were made or* . . . financial arrangements were *omitted* therefrom."[9] The words seem wide enough to embrace anything from an alteration in the financial position of the respective parties to such matters as the subsequent adultery of the wife,[10] a decree of nullity,[11] restitution of conjugal rights,[12] judicial separation,[13] divorce,[14] or the remarriage of either or both parties, provided these were not circumstances specifically provided for by the parties when the agreement was made.

The Royal Commission thought an amendment of the law desirable on three grounds: (1) because the extent to which the terms of existing agreements were valid and enforceable was uncertain, depending on whether the wife's undertaking not to apply to the court for maintenance could be severed from other terms; (2) because hardship was caused where a wife could not enforce the maintenance term in her agreement[15]; and (3) because "if the wife is to be allowed to apply to the court for an increase in the amount of maintenance provided under an agreement, on the ground of her husband's wilful neglect to provide reasonable maintenance,[16] then

[8] s. 1 (3).

[9] s. 1 (3) (*a*).

[10] It was a clear principle of the common law that a husband was not bound to maintain an adulterous wife, *sed quaere* if a maintenance agreement is in existence not containing a *dum casta* clause; *Charlesworth* v. *Holt* (1873) L.R. 9 Exch. 38.

[11] *Cf. Fowke* v. *Fowke* [1938] Ch. 774; *Adams* v. *Adams* [1941] 1 All E.R. 334, C.A., with *Galloway* v. *Galloway* (1914) 30 T.L.R. 531, D.C., *Hyman* v. *Hyman* [1929] A.C. 601.

[12] If such a decree were made during the currency of a separation and maintenance agreement, failure to comply with it would import desertion, when the principle of *N.A.B.* v. *Wilkinson* [1952] 2 Q.B. 648, would seem to apply.

[13] The decision in *Gandy* v. *Gandy* (1882) 7 P.D. 168, that a wife may not claim alimony on a judicial separation if she has covenanted not to do so in a separation deed has not previously been expressly overruled, although two members of the House of Lords in *Hyman* v. *Hyman* [1929] A.C. 601 were prepared to overrule it.

[14] *Charlesworth* v. *Holt* (1873) L.R. 9 Exch. 38, but see the comments of Scrutton L.J. in *May* v. *May* [1929] 2 K.B. 388, 392, and *cf. Hyman* v. *Hyman* [1929] A.C. 601.

[15] This was the result of the decision in *Bennett* v. *Bennett* [1952] 1 K.B. 249, C.A., but any hardship would seem to result not from the fact that the wife must apply to the court rather than rely on her own bargaining powers, but from the strict period of limitation laid down for applications to the court: Matrimonial Causes Act, 1950, s. 19, and *Simmonds* v. *Simmonds* [1956] P. 47; *Practice Direction* [1955] 1 W.L.R. 703.

[16] *Tulip* v. *Tulip* [1951] P. 378, C.A., extended to the magistrates' courts by *Dowell* v. *Dowell* [1952] 2 All E.R. 141, D.C.

it is only fair that the husband should be able to apply to the court for a reduction in the amount which he has undertaken to pay, on the ground that owing to changed circumstances it is reasonable that the amount should be reduced." [17] Although ground (3) is not explicit on the point, it seems as if the Royal Commission was envisaging intervention by the courts only in the event of a change in the financial circumstances of the parties.

That the Act envisages its application to a wider range of circumstances seems borne out by the declaration "for avoidance of doubt" [18] that nothing in the principal section affects any power of the court hearing proceedings between the parties under any other enactment to make an order containing financial arrangements. If financial provisions in maintenance agreements were not to be affected by a subsequent decree of nullity, restitution of conjugal rights, judicial separation or divorce, the courts' jurisdiction would in effect be limited in such proceedings to increasing by their order the amount of maintenance agreed upon between the parties.[19]

One of the advantages of maintenance agreements is that, whereas the jurisdiction of the court in a matrimonial cause is limited to ordering periodical payments during the lifetime of both parties, an agreement may provide for payments to continue after the death of one, normally the paying party, who will usually be the husband. The new Act widens the jurisdiction of the courts in providing [20] that in such circumstances if the first to die dies after the Act is in operation domiciled in England, the survivor may apply to the High Court only [21] within six months of a general grant of representation to the deceased's estate (or, with leave, at any time before administration is complete), in the same way as might have been done during the lifetime of both parties. As the only requirement is domicile in England at date of death, and there is no provision that the grant of administration must have been obtained in England, it would seem to be theoretically possible for application to be made in England for enforcement against assets situated abroad, and this seems a probability where, for example, a man domiciled in England leaves assets only in Scotland.[22] If the party chargeable under the agreement died before the Act came into operation, applications will be possible only if not less than four-fifths of the net estate remained undistributed on August 18, 1957.

[17] Cmd. 9678, para. 726.

[18] s. 1 (5).

[19] Unless the courts were prepared to apply the principle of *Cooper* v. *Cooper & Ford* [1932] P. 75, that a deed of separation is a marriage settlement which may be varied by the court under the Matrimonial Causes Act, 1950, s. 25, but it is doubtful how far this decision is still applicable in view of recent decisions and the present amending Act.

[20] s. 2.

[21] *Ibid.*

[22] Although the Act is expressed not to extend to Scotland or to Northern Ireland: s. 3 (3).

The clause enabling the court to insert a provision for financial arrangements where this has been omitted from a separation agreement is a new departure, and it is to be hoped that it will soon result in the overruling by a superior court of the decision in *Pinnick* v. *Pinnick*,[23] in which the Divisional Court has returned to the distinction previously drawn between consensual separations in which there is an express or implied agreement by the husband to continue to maintain his wife, and separations where there is no such agreement. The over-subtle distinction drawn between the wife's right to maintenance and the right of the public that she should be maintained [24] seems difficult to reconcile with the clear common law liability of a husband to maintain his wife if she is not guilty of a matrimonial offence. That the law should so favour the spouse who stands on his or her legal rights and drives a hard bargain in a melancholy situation seems, in the highest degree impolitic, and unlikely to advance public respect for the law.

In accordance with the recommendations of the Royal Commission,[25] jurisdiction to entertain applications under the Act is granted not only to the High Court, but also to the magistrates' courts. The jurisdiction of the High Court is grounded upon the domicile or residence of both parties in England, and the residence of the respondent alone, which suffices to ground jurisdiction for a decree of judicial separation, or for periodical payments where a husband has wilfully neglected to provide reasonable maintenance for his wife,[26] will not suffice. The magistrates' courts are granted jurisdiction, however, only where both parties are resident in England and at least one resides in the petty sessions area for which that court acts.[27] The extended jurisdiction to make maintenance (but not separation) orders, granted to magistrates' courts by the Maintenance Orders Act, 1950, does not apply. Nor may the magistrates' courts consider any application or make any order under the Act for payments exceeding £5 per week for a wife or 30s. for a child.[28] On the other hand, the recommendation of the Royal Commission that the superior, if still inadequate, collection and enforcement provisions attaching to orders made in the first place by the courts, should attach to variations made by them to the financial provisions of separation agreements, has not been implemented. Variations made by the courts are to have effect only as if they formed part

[23] [1957] 1 W.L.R. 644.

[24] As laid down in *N.A.B.* v. *Parkes* [1955] 2 Q.B. 506, C.A., where Denning L.J., at p. 517, stated that *Tulip* v. *Tulip* [1951] P. 378 overrode *Baker* v. *Baker* (1949) 66 T.L.R. (Pt. 1) 81, and *Chapman* v. *Chapman* (unreported, April 4, 1957). It is these decisions that the Divisional Court has chosen to follow in *Pinnick* v. *Pinnick*.

[25] Cmd. 9678, para. 730.

[26] *Armytage* v. *Armytage* [1898] P. 178; *Sim* v. *Sim* [1944] P. 87; *Matalon* v. *Matalon* [1952] P. 233.

[27] s. 1 (4).

[28] *Ibid.* This accords with the financial limits of maintenance orders made in the magistrates' courts under the Married Women (Maintenance) Act, 1949, s. 1.

of the original agreement between the parties, made for valuable consideration.[29]

In making their recommendation to the Royal Commission on Marriage and Divorce the General Council of the Bar did not consider it necessary to advance any argument on the principle underlying it, namely, how far it is desirable that a husband and wife should be permitted to vary by contract their rights and obligations *vis-à-vis* each other. The recommendation implemented by the new Act involves the rejection of the principle increasingly accepted by the courts in recent decisions,[30] that it is contrary to public policy that the parties should be able to oust the jurisdiction of the courts as to the financial arrangements existing between them, and that a wife's undertaking not to invoke the aid of the courts will, if it is the sole consideration on her side for a separation agreement, render the whole agreement void, even if by deed.[31] The Act will, of course, operate mainly in respect of moneyed people, who are far more likely to make separation agreements than are the poorer classes.

Not until 1848 did the House of Lords finally overthrow [32] the doctrine, previously accepted by both canon and common law and equity, that all separation agreements were void as contrary to public policy. Even when the doctrine of freedom of contract —and the devil take the weak and the inexperienced—was in full spate, some limits were always imposed on the doctrine in its application to married couples. Thus, agreements made in advance under which the parties agreed to separate at a future time were always void.[33] The only serious arguments that appear to have been advanced in favour of separation agreements were those put forward by Sir George Jessel in *Besant* v. *Wood*,[34] that the settlement of differences between married persons quietly out of court avoids expense and scandal. The arguments on the other side are: (1) those against freedom of contract in general, that whilst it may work well in the rare case, generally envisaged by the common law, of two parties at arm's length, equal in economic stature and bargaining power, and equally well informed of their own and the other's position and the surrounding circumstances, in the far more frequent event of inequality in any or all of these matters, it may be an instrument of injustice and oppression; (2) the argument of public policy in regard to bargains between married persons, (a) as regards their children (partially met by the provisions of the new

[29] s. 1 (3).

[30] *Hyman* v. *Hyman* [1929] A.C. 601; *Gaisberg* v. *Storr* [1950] 1 K.B. 107, C.A.; *Combe* v. *Combe* [1951] 2 K.B. 215, C.A.; *Bennett* v. *Bennett* [1952] 1 K.B. 249, C.A.

[31] *Bennett* v. *Bennett* [1952] 1 K.B. 249, C.A.

[32] *Wilson* v. *Wilson* (1848) 1 H.L.C. 538.

[33] *Wilson* v. *Carnley* [1908] 1 K.B. 729, 743; *Brodie* v. *Brodie* [1917] P. 271.

[34] (1880) 12 Ch.D. 605, 620, and see the comments of Lord Atkin in *Hyman* v. *Hyman* [1929] A.C. 601, 626. Lord Westbury's comments in *Hunt* v. *Hunt* (1862) 4 de Gex, Fisher & Jones 221, 233, boil down to a discussion as to which is to be master, canon law or common law.

Act), and (b) as regards themselves, which the Act does nothing to meet. It is well known that the maintenance agreement may be a bargaining factor coming very close to, if not overstepping, the line of collusion, where one party to a marriage is anxious for a divorce and remarriage, and the other is prepared to make harsh terms in return for "giving the other his freedom." It also seems extremely doubtful if the *Rose* v. *Rose*[35] clause, with its "charter of oblivion and indemnity" is really justifiable on grounds of public policy without disclosure, ousting as it does the jurisdiction of the courts in respect of matrimonial offences which the other party covenants not to bring in evidence.

The Act represents a triumph for the General Council of the Bar. It is very doubtful if it is one in which they have cause to take any particular pride, though it may well bring their members profit.

O. M. Stone.

[35] (1883) 8 P.D. 28.

REPORTS OF COMMITTEES

Royal Commission on the Law Relating to Mental Illness and Mental Deficiency [1]

The Report of the Royal Commission on the law relating to mental illness and mental deficiency is a major contribution to thinking on the legal aspects of the control and treatment of persons in need of psychiatric treatment. The Report runs to 324 pages of text, a four-page index, and ten introductory pages. It is the third Royal Commission on mental health legislation in this country.[2] The members of the Commission, under the chairmanship of Lord Percy of Newcastle, have with diligence and intellectual courage performed a task of great potential value to the community—in England, as in other Western countries, nearly half the hospital beds are occupied by mentally sick patients, and there is an extensive out-patient problem. This area of law shades off into such topics as criminal responsibility and the administration of the penal system, into the organisation of social casework for the aged and into many similar facets of social disorganisation. It is a problem of bricks and mortar and also of clinical psychiatry; a problem of the legal protection of individual liberty in an area where some coercion is inescapable and yet where our failures are generally failures of omission, of inadequate services, inadequate training facilities, and rudimentary therapies. It is not an easy area of law; it is not lawyer's law; yet there are few aspects of the law's role in the community where more is at stake.

The task facing the Commission was well stated by an expert committee convened by the World Health Organisation:

> "What is required is to give these patients facilities for treatment and the possibility of guardianship and medical supervision in accordance with their medical needs and social inadequacy. The different methods of solving these problems are extremely complex since they must vary according to the social structure of each country. No one system can be applicable to several different countries and even in one and the same country the systems advocated by some will be repudiated by others. Any system which comes into conflict with legal or cultural conceptions is inapplicable. It would seem, therefore, that preference should be given above all to establishing laws strongly

[1] Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, 1954–1957. Report. Cmnd. 169. H.M.S.O., 1957. Price 10s. 6d. net.

[2] Royal Commission on the Care and Control of the Feeble-minded (1904–1908). Royal Commission on Lunacy and Mental Disorder (1924–1926).

integrated into cultural traditions while at the same time leaving the way open for possible changes." [3]

This balance between medical needs and socio-legal attitudes is not an easy one to strike; the community at large posits, and present mental health legislation accepts, a view of mental illness which requires a custodial, community-protective, temporary-or-permanent-banishment approach to the treatment of the mentally ill; the psychiatric requirements are generally opposed to this and seek to provide treatment facilities, so far as is possible, on a voluntary basis, the patient seeing himself as not at all banished from the community. Overstated, it is the difference between the traditional fear of the lunatic and consequent rejection of him and the appreciation that the desirable community reaction to mental ill-health should be identical to the present reaction to physical ill-health.

The Report commences with an eighteen-page summary of the main conclusions and recommendations of the Commission which cannot responsibly be further summarised. The spirit of the recommendations is captured, however, in paragraphs 7 and 8:

> " We recommend that the law should be altered so that whenever possible suitable care may be provided for mentally disordered patients with no more restriction of liberty or legal formality than is applied to people who need care because of other types of illness, disability or social difficulty. Compulsory powers should be used in future only when they are positively necessary to override the patient's own unwillingness or the unwillingness of his relatives, for the patient's own welfare or for the protection of others.
>
> " When compulsion has to be used, there must be special procedures and safeguards. We recommend new procedures for this purpose which would replace the present certification procedures. We hope that the term ' certification ' and the ideas associated with it will fall completely into disuse and that the public will recognise that these procedures carry no implications about the probable length or cause of the patient's illness or disability."

The Commission recommends the abandonment of the legal terms " idiot," " imbecile," " mental defective," " defective " and " person of unsound mind," and the recognition of three main groups of patients for legal and administrative purposes—" mentally ill patients," " psychopathic patients or patients with psychopathic personality " and " patients of severely subnormal personality." This process or renaming mental conditions is of more value than at first sight appears; attitudes tend to become fixed around the type of words the Commission seeks to exorcise and we do well, as we try to develop new legal patterns and new psychotherapeutic

[3] Legislation affecting Psychiatric Treatment, Fourth Report of the Expert Committee on Mental Health, World Health Organisation, Technical Report Series, No. 98, Geneva, July, 1955, p. 25.

services, to introduce unemotive words to describe the generic groups of patients that are subject to those services.

Concerning voluntary patients, the Commission recommends that:

> "All forms of hospital and community care should be available in future to patients who are content to receive them without the use of compulsory powers and procedures or formal ascertainment. The administrative methods by which proper standards of care are maintained should not be linked to the procedures prescribed for detained patients and need not be laid down in detail in the law.
>
> "The law should no longer prevent mentally ill patients from entering hospital without being subject to detention if they cannot make a valid positive application for admission. These patients, like physically ill patients, should be assumed to be content to enter hospital unless they positively object. When patients are admitted without powers of detention there should be no special formalities. They should not be obliged to sign an application for admission, nor to give formal notice of intention to leave. Acceptance of these principles should allow a considerable number of patients who now have to be certified, including many elderly senile patients, to be admitted informally, as to any other hospital or home." [4]

They suggest a comprehensive scheme for achieving this far-reaching aim.

Likewise, concerning other than voluntary patients, a less formal and legally less cumbersome system of compulsory admissions to mental hospitals is suggested, based on two medical recommendations (one, in an emergency, may suffice for the first seventy-two hours) when the patient or his relatives oppose such an admission. An administrative system of safeguards against wrongful detention is devised with specific duties being placed on Mental Health Review Tribunals, accessible to patients and their relatives, to inquire into the justification of the use of compulsory admission or detention powers. Such tribunals should be organised regionally, their chairman being legally qualified and their members, medical and non-medical, being appointed by the Lord Chancellor in consultation with the Minister of Health.

The legal framework for psychiatric services envisaged by the Commission offers promise for the expansion and development of those services; it is well to remember, however, that the legislative acceptance of such a scheme in itself will achieve nothing in this regard, and the shortage of men and materials, particularly of trained psychiatrists and their attendant psychological, social casework, and nursing services, will remain. But the Commission has fulfilled its task with an unusual combination of the reformer's vision and the administrator's grasp of detail. Having said this, one may,

[4] Cmnd. 169, p. 7.

perhaps, be permitted to disagree with their recommendations concerning "psychopathic patients" who have been convicted by a criminal court. For these, the Commission recommends that:

> "In our opinion it would do much more harm than good to try to include in the law a definition of psychopathic personality on the analogy of the present legal definition of mental defectiveness. It is far preferable that, in referring to various forms of mental disorder, the law should use general terms which will convey a sufficiently clear meaning to the medical profession without trying to describe medical conditions in detail in semi-medical language. . . . It would in any case be particularly difficult to find a suitable detailed description of psychopathic personality. Such a description would probably have to mention the particular aspects of the personality which may be affected, and possibly also try to give some guide as to the cause of the disorder. But there are too many different types of psychopathic personality, and too little is at present known about their essential nature and causes, for a description of this kind to be easily agreed; and even if one were agreed now, increasing knowledge might soon make it out of date. Lack of knowledge about the nature and causes of particular forms of disorder does not mean that they cannot be recognised and successfully treated in individual patients." [5]

This is the proposition: though I cannot define an elephant, I can recognise one when I see it, which sounds a good analogy but is, of course, dangerously misleading when you allow consequences of compulsory detention to flow from it.

The Commission then recommends that for the group so undefined:

> "In cases in which the court is satisfied that normal methods of disposal alone are insufficient or inappropriate and that the patient requires special medical or social care which a particular hospital or local authority is able and willing to provide, it should be possible for such hospital or community care to be provided, with or without special compulsory powers as appropriate. If the court is satisfied, in addition, that there is real danger of the commission of further and serious offences if the patient is discharged prematurely, quarter sessions and assizes, but not magistrates' courts, should be able to direct that he should not be set at large without the consent of the Home Secretary within such period as the court thinks fit." [6]

The Commissioners expressly desire to leave these powers unlimited as to type of offence and duration of detention, arguing that "The need for the public to be protected from dangerous psychopathic patients for as long as their dangerous tendencies persist is no less great than the public's need to be protected from mentally ill patients who are dangerous" [7] and they expressly accept the possibility that

[5] Cmnd. 169, p. 127.
[6] Cmnd. 169, p. 173.
[7] Cmnd. 169, p. 179.

if there is " a strong need to protect others from anti-social behaviour by the patient," [8] compulsory powers to detain the criminal should be exercised even in excess of any maximum period specified by the court when sending the offender for treatment as a psychopathic criminal.

The procedural machinery to carry out this type of sentencing is complex, relies heavily on adequate pre-sentence advice to the courts and on the availability of treatment facilities, and seeks to make use of the Mental Health Review Tribunals to ensure that patients are not improperly detained. The Report advocates many safeguards in an endeavour to avoid injustice, both at the court and at the review tribunal level; but I doubt their efficiency in practice; further, I doubt their social morality. I doubt the need for taking such powers and for creating what the Commissioners recognise may be a new quasi-criminal code. Surely, at the present stage of our skills in predicting human behaviour and in predicting and treating criminal behaviour, we should limit an individual's freedom only for the period that we would normally sentence him for his crime, independently of a prediction of his future conduct, or for the period that we would normally compulsorily hold him in a mental hospital because of his mental condition, independently of the criminality of his behaviour. To set up a middle ground justifying custody half by an undefined mental condition and half by a prediction of crime, the whole power being taken pursuant to the commission of a crime, is, I would submit, to get the worst of both worlds and, for the individual, the protection of neither. Nor is there anything like sufficient evidence of the psychiatric treatability of this vaguely diagnosed group of psychopaths to justify regarding them as a group properly to be held indefinitely under psychiatric treatment.

The upper limits of sentencing practice by the criminal courts should provide an ample duration of time for such psychiatric therapy as the community is likely to provide, whether in prisons or in mental hospitals, or in institutions which are half prison and half mental hospital.

In relation to those who have committed criminal offences, the concept " psychopath " will, too often at the present stage of our knowledge, be found to be merely a synonym for " one who has done a certain type of act " or for " one who lives a certain type of life," and to import no reliable psychiatric referents.

Despite great respect for the work of the Commissioners it is submitted that they overreached themselves by offering recommendations in these highly contentious borderlands of criminal responsibility. It is hoped, however, that their foray into this country will not prevent lawyers from recognising the value and

[8] Cmnd. 169, p. 111.

importance of the rest of the Report, and the need to reshape this area of law in accordance with the Commissioners' recommendations.

Norval Morris.

Committee on Homosexual Offences and Prostitution

After almost exactly three years' deliberations, the Departmental Committee on Homosexual Offences and Prostitution set up by the Home Office under Sir John Wolfenden as Chairman presented their report last August (Cmnd. 247). The document which, with its statistical appendices, covers more than 150 pages has deservedly had a good and full press and can be welcomed as an eminently sensible and well-balanced piece of work.

The Committee explain from the outset that they have approached their task from the point of view that "it is not the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour." Thus they do not concern themselves "with prostitution itself but with the manner in which the activities of prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive or injurious, or involve the exploitation of others." The amendments of the law now recommended in this field are largely technical and, it is to be hoped, non-controversial, and will not concern us further in what is said below.

Application of similar principles to the problem of homosexuality was almost bound, though for wholly different reasons, to lead the Committee to the conclusion that "homosexual behaviour between consenting adults in private be no longer a criminal offence" (62). That the Committee should have been able to make this, their first and by far the most important recommendation with only one dissentient voice may be taken, I hope, as evidence of a saner atmosphere in these matters beginning to prevail in the community as a whole. The extremely careful manner in which the Wolfenden Committee have discussed and refuted the arguments in favour of the present law and have formulated their proposal for a limited degree of toleration for adults should at any rate go some way towards countering those die-hards who, even before the appearance of the Report, had been fulminating against every suggestion that legislation might conceivably be enacted in this direction.

The polemical suggestion that such an amendment would "open the floodgates" to homosexual behaviour has certainly found no favour with the Committee who are, moreover, able to point to the experience of the police in Sweden, where no evidence whatever was found of any marked increase after homosexual acts between consenting adults in private ceased to be criminal offences there in 1944. On the contrary the changes now recommended could,

indirectly, reduce the number of offences committed by adults against adolescents under twenty-one years of age, since homosexuals might, to some extent at least, turn from practices which are punishable to such as are not (57). This is by no means unimportant since the protection of children and juveniles against undesirable attentions from older men must remain one of the prime objectives of the law.

If the stigma of crime were to be removed, as the Departmental Committee recommend, from homosexual behaviour in private among consenting adults, the number of proceedings taken annually for homosexual offences would not be vastly reduced, for statistics show that in the three years ending March, 1956, no more than 300 men were convicted in this country solely for offences which fall under this definition. This is, of course, merely a small, probably minute fraction of those practising homosexuals who render themselves liable for imprisonment under the law as it now stands (129), and so the real importance of the amendment would be to place this group out of the constant jeopardy under which they now live. The Committee are at pains to point out that in recommending such a change in the law they are not pronouncing upon the moral issue involved but intend "to emphasise the personal and private responsibility of the individual . . . which a *mature agent* can properly be expected to carry for himself without the threat of punishment from the law." Accordingly, even homosexual behaviour among boys such as mutual masturbation practised in the puberty stage would remain—in contrast to the more realistic and enlightened law of most Scandinavian countries —punishable, although proceedings could be taken in such cases only by the D.P.P. or with the sanction of the Attorney-General.

Altogether, throughout the Report, the Committee have done their best to avoid adding any fuel to the controversy surrounding the problem of homosexuality which might lead to a repetition of the emotional sensationalism which accompanied the recent debates about the abolition of the death penalty. "Homosexual behaviour," they say, "is practised by a small minority of the population and should be seen in proper perspective, neither ignored nor given a disproportionate amount of public attention." Nor have the Committee made much of the oft-repeated allegation that the prevalence of homosexuality has sharply and dangerously risen in the recent years, though they "think it improbable that the increase in the number of offences recorded as known to the police can be explained *entirely* by greater police activity" and have found "no evidence of any 'drive' on a *national* scale" (45, 130). The cautious wording of these findings, nonetheless, leaves quite a lot to be read between the lines. The Committee, in any case, expressly "deprecate any out-of-the-way prying" on the part of the police where no clear public interest is involved (131), and they make it clear that undue discrepancies in the enforcement of the

law, so that in some parts of the country prosecutions are not initiated unless an offence has obtruded itself upon the notice of the police, while in other parts a firm effort is made to apply the full rigour of the law, tend to cause not only justified grievance of discrimination, but also bring, " if not the law, at least the police, into disrepute."

Wide local variations in the enforcement of the law by the police is only one aspect of the administration and execution of the criminal law regarding homosexuality which at present—and, as the Committee recognise, with justification—gives rise " to a feeling of injustice and unfairness in the minds of those who are brought to trial." Another equally serious disparity is the " lack of uniformity in the treatment of offenders by the courts which sometimes gives the appearance of arbitrariness " (177) and, say the Committee, is " wide enough to justify . . . concern " (178). The very fact that the Committee have voiced, albeit carefully, these criticisms both of the police (or indirectly of Watch Committees) and of the courts is unlikely to leave the subject of homosexuality where it was before the Report.

Indeed, whereas it is at this stage hazardous to speculate whether, and when, effect will be given to those recommendations which require legislation, all the Committee have to say on the subject will no doubt be studied with great care by all concerned with the administration of the law as it stands. This reason makes one regret all the more that the sections of the Report dealing with " The Treatment of Offenders " (chapter VI), and with " Preventive Measures " (chapter VII)—which depend less on the letter of the law than on a sensible practical approach—are the least searching in substance and the vaguest in formulation.

At one point the Committee rightly stress that " the academic question whether homosexuality is a disease is of much less importance than the practical question of the extent to which, and the ways in which, treatment can help those in whom the condition exists " (191). It would seem obvious that the answer to this must invariably depend on the individual circumstances and conditions of each offender who comes before the court. Alas, in view of the strong feeling of revulsion with which many people approach this whole subject, this angle is all too often lost sight of and the Report does not unequivocally redress the balance. The Committee's approach to the widespread demand for obligatory psychiatric examination of all homosexual offenders between verdict and sentence is a case in point. The Report points out, rather optimistically, that " the courts are ready to call for medical reports where there are any grounds, either in the facts of the case or in the convicted person's previous history for supposing that a medical report would be helpful " (184), but (with certain exceptions: 187) turns down the proposal. It does so partly on account of practical difficulties such as a national and local shortage of

expert psychiatrists, and delay (185), but mainly it would appear, for the (somewhat contradictory) reasons (1) that "there are other kinds which seem to need medical investigation no less" (183), so that it is "not clear" why homosexual offenders should be "singled out" and (2) that not much would be gained by requiring the court invariably to obtain a report (184).

It would appear that in this instance the Committee have not fully appreciated the purpose of the proposed psychiatric examination. No doubt it is true that where there are serious suspicions of a recognisable mental abnormality of an offender, a medical report is in most cases called for. But upon trial for homosexual offences a special need for a psychiatric report arises in order to assess the willingness of the offender before the court to undergo medical treatment for his condition and his likely response, and in order to make (as far as possible) a prognosis or forecast of his chances for sexual reorientation or improvement of adjustment. Now, as the Committee themselves say, mental abnormality together with inadequate intelligence are among the chief reasons which make a man *un*suitable for psychotherapeutic treatment of his homosexual propensities. Many offenders, on the other hand, who *do* offer some prospect of success are at present not examined from this point of view at all. As a result, in deciding what to do with a convicted offender, the court of trial may lack vital data which could be ascertained, and this is the more regrettable since it cannot call, under the present law of evidence, upon the assistance of a court expert as was suggested by the joint Committee of the British Medical Association and the Magistrates' Association some years ago.

Surely it can be taken as agreed that any homosexual offenders who can benefit from psychotherapeutic treatment or from expert guidance should, in the interest of the public as much as in their own, be given the opportunity of such treatment? Only when it is established, by medical examination, that these measures are likely to be fruitless, or if they have failed, is there any justification for putting a man away as a "public nuisance." The Committee may be right that, in order to assure adequate protection to the public, "prison will *always* have its place as a method of dealing with the homosexual offender" (208). But they seem to accept all too lightly the fact that in 1955, the last year for which complete statistics are available, no fewer than 30 per cent. of all such offenders ended up in prison (usually on short sentences), where facilities as well as prospects for treatment are so slight at present that the Committee themselves find it necessary to condemn the practice of some courts which tend to intimate to the offender that he will receive medical treatment there, or even that he is being sent to prison for this purpose (178).

Even in those cases where the primary object of the court sentence must be the protection of the public it is not quite easy

to see what will be achieved by six or nine months in prison which many, under present conditions, consider downright incitement to recidivism. It is equally hard to make out what good, from whatever angle one views the matter, is likely to be done by the mere imposition of a small *fine*. Yet this is the solution adopted by the courts in another 30 per cent. of the cases before them, and the Committee note this without apparently feeling called upon to offer the slightest comment (158).

This, and the absence of all reference to after-care in the Report, make it appear that the Committee, having once come to the conclusion that " homosexuality is not a disease "—which is, after all, largely a question of definition—, have taken all too pessimistic a view of the prospect of treatment in general. In how far a complete change of sexual preference can be brought about by psychotherapeutic treatment is indeed still scientifically an open question which depends, at least partly, on the degree of homosexual propensity and on the degree to which such habits have become established. Readjustment, however, as is rightly pointed out in the Report, does not necessarily mean total reorientation to hetero-sexuality; it achieves its object if it brings about better adaptation to life in general or even better control. It is in any case highly significant that the two medical members of the Committee, in a lengthy and most valuable supplementary Note, reason convincingly that the Committee's main Report has shown " undue pessimism in assessing the outlook for many homosexuals."

This shows itself particularly in the somewhat luke-warm way with which the Committee suggest that " there is room for a more extensive resort to probation with a condition of medical treatment " (200) without, however, introducing this vital point into their recommendations. It is also, perhaps unfortunate that the Committee should not have addressed themselves to the additional problem which arises in these specific cases upon probation: namely, that one relapse in the course of treatment does not necessarily prove that the condition is hopeless.

It is generally accepted that treatment of homosexual propensity —whether in the sense of reorientation or better adaptation—stands the higher a chance of success the sooner it is begun. In these circumstances it is regrettable that in their final meagre chapter on " Preventive Measures," the Committee should have little or nothing to say on the role which sensible education in matters of sex has to play in dealing with homosexual practices during puberty. It must be admitted that the available scientific data of causes and development of homosexual tendencies are still quite insufficient to base on them a definite educational policy. But if, for instance, it is admitted that lack of association with members of the opposite sex at a critical stage in sexual development has at least an aggravating effect, responsibilities and problems of a serious

order fall upon schoolteachers and those responsible for the upbringing of the young, particularly in boarding schools, which the community is naturally slow to face but which the Report of the Committee should not have shirked.

H. A. HAMMELMANN.

COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES

THE Committee on Administrative Tribunals and Enquiries (Chairman: Sir Oliver Franks) issued its Report in July, 1957 (Cmnd. 218). On October 31, 1957, the Secretary of State for the Home Department and Lord Privy Seal (Mr. R. A. Butler) stated the attitude of the Government to some of the recommendations included in the Report.

The principal recommendations of the Committee were:

(1) Two standing Councils on Tribunals, one for England and Wales and one for Scotland, should be set up to keep the constitution and working of tribunals under continuous review. The Council for England and Wales should be appointed by and report to the Lord Chancellor. The Scottish Council should be appointed by and report to the Secretary of State for Scotland (paragraph 43). The Government accepted this in principle but propose to appoint only one Council appointed jointly by the Lord Chancellor and the Secretary of State for Scotland.

(2) Chairmen of tribunals should be appointed by the Lord Chancellor (or alternatively, in Scotland, by the Lord President of the Court of Session or the Lord Advocate). Members should be appointed by the Council on Tribunals. Recommendations for appointments by the Crown should be made by the Lord Chancellor (paragraphs 48–49, 53–54). The Government accepted that chairmen should be appointed by the Lord Chancellor (or the Lord President of the Court of Session), but considered that members should be appointed by Ministers, after consultation with the Council.

(3) All chairmen of tribunals exercising appellate functions should have legal qualifications; chairmen of tribunals of first instance should ordinarily have legal qualifications (paragraphs 55, 58). The Government accepted this in principle.

(4) The detailed procedure for each tribunal should be designed to meet its particular circumstances and should be formulated by the Councils on Tribunals in the light of the general principles enunciated in this Report. The aim should generally be to combine an orderly procedure with an informal atmosphere (paragraphs 63–64). The Government accepted this in principle.

(5) The right to legal representation before tribunals should be curtailed only in the most exceptional circumstances (paragraph 87). The Government accepted this, but considered that the local

service committees under the National Health Service might be a special case.

(6) The official scheme of legal aid should be extended at once to tribunals which are formal and expensive and to final appellate tribunals. The Government stated that this could not be done at present.

(7) Decisions of tribunals should be reasoned and as full as possible (paragraph 98).

(8) There should be an appeal on fact, law and merits from a tribunal of first instance to an appellate tribunal, except where the tribunal of first instance is exceptionally strong and well qualified (paragraphs 105–106).

(9) As a matter of general principle, appeal should not lie from a tribunal to a Minister (paragraph 105).

(10) An appeal on a point of law should lie to the courts from a tribunal decision, except from a decision of the National Insurance Commissioner, the Industrial Injuries Commissioner or National Assistance Appeal Tribunals. The machinery for such appeals should be simple, cheap and expeditious and should be formulated in detail by the appropriate Rule Committees. Decisions of the National Insurance Commissioner, the Industrial Injuries Commissioner or National Assistance Appeal Tribunals should remain subject to review by certiorari (paragraphs 107–112).

(11) No statute should contain words purporting to oust the remedies by way of certiorari, prohibition and mandamus (paragraph 117).

(12) The adjudicating functions now exercised by County Agricultural Executive Committees should be entrusted to new independent tribunals from which appeal should lie to an Agricultural Land Tribunal or to the Scottish Land Court (paragraph 148). The Government accepted this in principle.

(13) An appeal should lie from a Rent Tribunal to an appellate tribunal consisting of a county court judge or sheriff, sitting with a valuer as assessor (paragraphs 165–166).

(14) The right of appeal from the National Health Service Tribunal to the Minister should be abolished, and the right of appeal from Executive Councils to the Minister in certain cases should be replaced by a right of appeal to the Tribunal. As a safeguard for practitioners, appeals by individual complainants should be heard by the Tribunal in private (paragraphs 205–207).

(15) The main body of inspectors in England and Wales should be placed under the control of the Lord Chancellor, but inspectors might be kept in contact with policy developments in the Departments responsible for inquiries. The preference of certain Departments for independent inspectors appointed *ad hoc* need not be disturbed. If a corps of inspectors were established for Scotland, the Lord Advocate should assume responsibility for it (paragraphs 303–304). The Government stated that inspectors should continue

to be appointed by Ministers, but only after consultation with the Lord Chancellor.

(16) Inspectors' reports should be published in full with Ministers' letters of decision; the factual part of the report should be published before the Minister's decision and opportunity given to propose corrections to the findings of fact (paragraphs 328, 344, 345). The Government agreed to the publication of inspectors' reports.

The summary of main recommendations was contained in 95 paragraphs. It will therefore be appreciated that the above sixteen recommendations form only a small part of the whole. The Government have left many points open for further discussion. Many of the recommendations require legislation, and a Bill was mentioned in the Queen's Speech on November 5, 1957. The debate will be found in 575 H.C. Deb., cols. 400–519 (October 31, 1957).

J. A. G. GRIFFITH.

NOTES OF CASES

Duties of Non-Occupiers of Land

There can be few cases which more strikingly illustrate the difference between the nature of the judicial process in appellate courts in England and the Continent than the decision of the House of Lords in *A. C. Billings & Sons, Ltd.* v. *Riden.*[1] As a French case ascends to the Cour de Cassation, the abstraction of a legal principle from the peculiarities of the case, which Austin saw as an *ex post facto* technique for eliciting the *ratio decidendi* of an English case, occurs in the procedure of argument and judgment: many a judgment of the Cour de Cassation is limited to the specific enunciation of a general principle of law. But in *Billings* v. *Riden,* the members of the House of Lords entered on a careful scrutiny of the details of the facts, and, indeed, Lord Keith almost dissented because of a new point of view about the facts. In my note on the case when it was before the Court of Appeal I was content to summarise the facts thus: "Contractors were employed to carry out alterations to the entrance of a house on the top floor of which there was a flat. The alterations took more than one day, and during the evening of the first the entrance to the house was left in an unsafe condition. Visitors to the residents in the flat managed to get in safely during daylight, but on leaving at night the plaintiff was injured."[2] In the House of Lords there was minutely considered whether the workmen had recommended a particular route as a mode of ingress and egress, what was the character of the route,[3] whether another route via a back door existed,[4] and where on the route the plaintiff's accident occurred—on the particular ground belonging to the house, or on adjacent grounds where the visitor was a trespasser.[5] Nevertheless, it is

[1] [1957] 3 All E.R. 1; also reported at [1957] 3 W.L.R. 496.

[2] (1957) 20 M.L.R. 288.

[3] Lord Keith said: "I should have liked to know more about the terrain . . . It is quite impossible, in my opinion, to accept the evidence of the respondent, a woman seventy-one years of age, that she stepped up three feet to get on to the ramp." (12G) Why not? How can one guess accurately the physical condition of an unseen woman? According to Lord Reid, moreover, "It is true that the respondent was seventy-one years of age but she seems to have found no great difficulty in getting up a step from the ground to the top of the ramp which other witnesses say was two or three feet high." (9C)

[4] Lord Reid: "I will at this point deal with two matters which have been referred to in argument, but which received little attention at the trial." (8A) The first point was whether the back door exit existed, or whether the door was locked: the second was whether the cause of the accident was a plank laid on the route by another visitor.

[5] Van Mehren, in his excellent comparison of judicial process in the United States, France and Germany, considers that a "mechanical" attitude (*i.e.*, an undesirable one) is encouraged by isolation from the facts, and that a

possible to consider the general grounds of the judgments of the Lords, who unanimously affirmed the decision of the Court of Appeal that the contractors had committed a breach of a legal duty owed to the plaintiff.

(1) The proposition assumed by Hallett J., *viz.*, that since the plaintiff was a licensee so far as the occupiers of the land were concerned, the contractors owed no different duty to her from that owed by an occupier to a licensee in respect of the condition of the premises, was rejected.[6] Lord Somervell valuably enunciated the contradictory general proposition: " a person executing works on premises . . . is under a general duty to use reasonable care for the safety of those whom he knows or ought reasonably to know may be affected by or lawfully in the vicinity of his work." [7] This principle is accepted by all the Lords.[8] Lord Somervell points out that a consequence of the principle is that *Malone* v. *Laskey* was wrongly decided, and also *Bell* v. *L.C.C.* " insofar as [it] was based on the decision in *Malone* v. *Laskey*." Lord Reid says: " *Malone's* case ought to be overruled insofar as it dealt with negligence."

It will be recalled that Denning L.J. explicitly pointed out that this duty owed by those executing work on premises applied also to occupiers of land. No speech specifically makes this point: their Lordships adhere closely to the law called for by the facts of the case. But the absence of adverse comment is nevertheless significant.[9]

(2) It had been contended that the contractors would have discharged their duty by warning of the danger that existed, and that the plaintiff's knowledge of the danger obviated the necessity for warning. This argument originally derived from the erroneous assumption that the contractors merely owed the same duty as that of an occupier to a licensee: but in the Court of Appeal, Roxburgh J. stated that a warning of danger created by anybody

" functional " attitude (*i.e.*, a praiseworthy one) is encouraged by full appreciation of the facts: *Judicial Process in U.S. and Germany*, I Festschrift für Ernst Rabel, 86; *Judicial Process in U.S. and France*, 22 R.J.U. Puerto Rico, 254.

[6] Lord Reid charitably found an explanation for the assumption of Hallett J. in the fact that the occupiers were also sued.

[7] 13I. He adds: " Some of the phrases in the above statement are taken from the judgment of Denning L.J. in this case and some from that of Scrutton L.J. in *Kimber* v. *Gas Light and Coke Co.* ([1918] 1 K.B. 439 at p. 447). I also agreed with Scrutton L.J. that this is laid down plainly in *Corby* v. *Hill* ((1858) 4 C.B.(N.S.) 556 at p. 557)."

[8] Lord Reid (opinion concurred in by Viscount Simonds) 5C: Lord Cohen (who also expressly agreed with Lord Reid and Lord Somervell) 10F, quoting Denning L.J. in the Court of Appeal : Lord Keith 12I.

[9] The existence of a general activity duty on the part of occupiers of land to licensees was clearly relevant to the plaintiff's claim in the rightly criticised case of *Ashdown* v. *Samuel Williams & Sons, Ltd.* [1957] 1 Q.B. 459; [1957] 1 All E.R. 35. It is surprising in view of all the recent case law on this question that the only authority quoted there is Salmond on *Torts* citing *Gallagher* v. *Humphrey* (1862) 62 L.T. at pp. 684, 685 (see *per* Jenkins L.J. [1957] 1 All E.R. at p. 42D). It is doubtful to my mind whether *Ashdown's* case can " stand with " *Billings* v. *Riden*.

is sufficient. No speech made any express reference to the judgment of Roxburgh J., but Lord Cohen said: "I do not think that it is true to say that in all cases the only duty imposed on contractors is a duty to warn." [10] The general attitude of the Lords is well expressed by Lord Somervell: "The duty being a general duty to use reasonable care, reasonableness is the test of the steps to be taken." [11] In some circumstances a mere warning may be reasonable, in others much more may be required. In the circumstances of the instant case one Lord thought that a warning was sufficient.[12]

This principle, *viz.*, that it depends on the circumstances whether a duty to exercise reasonable care to visitors is fulfilled by a warning, must, in consonance with the general reasoning of their Lordships, apply to the activity duty of occupiers. It follows that doubt must exist as to the correctness of the decision in *Ashdown* v. *Samuel Williams & Sons*,[13] in which it was assumed that an appropriate warning notice to licensees must be effective to exempt occupiers from liability, since it would be a condition of the exercise of the licence.[14] As Gower has pointed out in his powerful notes in this journal,[15] this assumption confuses liability in contract with liability in tort. In tort it is not appropriate to speak of conditions of a licence, and a warning notice remains but a warning. As a warning it cannot be assumed that irrespective of circumstances it operates to exempt an occupier for liability.[16]

(3) The insistence by their Lordships that the legal test of an activity duty cannot be made more specific than that of "reasonableness," [17] so that what has to be done in particular circumstances is determined by application of the general principle without creating any more specific legal rule, is also illustrated by the criticism to which a doctrine of Denning L.J. was subjected. The Lord Justice, speaking of the contractors, said: "It is true that they were under no duty to visitors to provide an alternative route for getting to the front door." Their Lordships treated this as an

[10] 11C: *pace* the views of Goodhart the phrases "I think," "I do not think," are not always expressive of doubt when used by judges.

[11] 14C.

[12] Lord Reid comes nearest to suggesting that a warning might have sufficed. He thought, however, that the contractors far from warning against the use of the route advised its use: "If they had [given warning] it is by no means improbable that matters would have developed in such a way that the respondent would never have taken this route": 10C. Lord Cohen also said: "if a warning was enough, no warning was in fact given."

[13] [1957] 1 Q.B. 459: [1957] 1 All E.R. 35.

[14] See *per* Jenkins L.J. [1957] 1 All E.R. at 42E.

[15] (1956) 19 M.L.R. 532, commenting on the decision of Havers J.: (1957) 20 M.L.R. 181, commenting on the decision of the Court of Appeal.

[16] Gower's comment in (1956) 19 M.L.R. at p. 534 requires modification. He writes as if a warning could never be sufficient. No doubt he had in mind the particular circumstances of *Ashdown's* case.

[17] Acceptance of a test of "reasonableness" is one of the causes of the close scrutiny by their Lordships of the facts of the case. What is "reasonable" always depends on circumstances.

enunciation of a legal rule and not as an application of the general principle to the particular facts. So regarded it was condemned. Lord Somervell said: "This is the wrong approach. Their duty is to do what is reasonable. There may well be cases where it is reasonable to leave the normal route dangerous and to provide a safe alternative." [18]

(4) Another contention was that the plaintiff's knowledge of the danger not only made it unnecessary to warn, but operated to make her action, to use old-fashioned terminologoy, a *nova causa interveniens*. Denning L.J., in rejecting this contention, used language that: "knowledge of the danger is only a bar where the party is free to act on it." Their Lordships again preferred to use the criterion of "reasonableness." Lord Reid said: "Freedom is a word which has come to have very different meanings. If this test leads to the same answer as the question, whether, in all the circumstances, the visitor acted reasonably, well and good: but if not, I think, that in cases like the present, reasonableness is the better test and is more in accordance with principle." [19]

(5) The one matter on which there was disagreement in the Lords arose from the doubt whether the accident occurred on the particular ground belonging to the house, No. 25, where the contractors were employed, or whether it occurred on the neighbouring premises, No. 26, where the plaintiff trespassed. The new route resulting from the alterations to the front entrance involved crossing the neighbouring premises: on those premises there was an unfenced basement, down which the plaintiff undoubtedly fell. Lord Keith found as a fact that the plaintiff slipped while still on the grounds of No. 25 and "was precipitated" into the basement of No. 26. But, he thought that if the plaintiff had safely left No. 25 and then fallen while in the grounds of No. 26, there would be no liability. "If a person encourages a trespass and another person accepts the encouragement, both being aware of the position, and the actual trespasser is injured by some danger on the land trespassed on, known to both, there is no principle I know of which would attach liability to the instigator or encourager in a question with the trespasser." Because of this he rejected the view of Denning L.J. that: "A contractor who creates a dangerous state of things cannot escape the consequences by leading people into another danger," saying: "No case was cited to me, and I know of none, where a contractor has been held liable for a danger not of his own creation

[18] 14C. *Cf.* Lord Cohen at p. 11G: "It might well be that he must create an alternative route."

[19] 9I. *Cf.* Lord Somervell at p. 15E; and my note in (1957) 20 M.L.R. at p. 289: "A warning may be ineffective . . . if given in such circumstances that it is not reasonably likely to be acted on: such circumstances exist where it is directed to persons who could not reasonably be expected to alter their proposed course of conduct."

and existing on adjacent property with which he had nothing to do and with which he had no right to interfere." [20]

It is true that Denning L.J. did not address himself to the question of where the accident occurred, and that Lord Cohen, who specifically approved of the dictum of Denning L.J., also found that the plaintiff "commenced to fall while still on the premises of No. 25." [21] Nevertheless, Lord Cohen's opinion is opposed to that of Lord Keith, and rightly so. He said: "It is true that the appellants had no legal right either to fence [the basement] or place warning lamps around it. But this is, in my opinion, irrelevant." [22] Even if the plaintiff had safely left No. 25, nevertheless she would have encountered a danger on No. 26 created by the contractors' act. Lord Keith ignores the quality of illegality in the contractors' acts: by speaking of encouragement of a trespass he diverts attention from other aspects of the contractors' act. The blocking of the normal route did not merely encourage the plaintiff to trespass on No. 26, it made it reasonably requisite. The unfenced basement on No. 26 was no danger to anybody until the contractors' actions led to people coming into proximity to it in the dark. If the accident was due to the contractors' act it could not matter where it occurred, or that the plaintiff was guilty of a breach of legal duty to somebody else. To make such particular matters determinative of liability is to depart from the insistence on the general test of reasonableness, which is otherwise so pronounced and so happy a feature of the speeches of their Lordships.

J. L. Montrose.

Reasoned Judgments

The story has been told in many forms of the recently appointed county court judge, whose elevation was largely the result of his political activity, and who sought advice as to his new duties from a friend. He was advised to announce his decisions clearly and firmly, but never to give reasons. "Your decisions may sometimes be right, but your reasoning will always be wrong." According to French law judgments must be "motivés": but it has hitherto been thought that English law does not require a judge to give any reasons, whether of fact or law, for his decision. So, too, the orders of administrative tribunals could be silent as to their reasons. In a recent note I have submitted that the Court of Appeal has unlocked the door which at present excludes a requirement for

[20] 13B. The last dictum, more typical of some English judges of caution (see, *e.g.*, Lord Buckmaster in *Donoghue* v. *Stevenson* [1932] A.C. at p. 567) is surely not in accordance with "The Spirit of the Law of Scotland," the subject of Lord Keith's Holdsworth Club address.

[21] 11B.

[22] 11A.

speaking orders by administrative tribunals.[1] In the case of *Craven* v. *Craven* [2] the Court of Appeal has now lifted the latch and introduced a requirement for trial judges to give judgments which are reasoned to the extent of stating the findings of fact on which they rely.

A wife had petitioned for divorce on the grounds of cruelty, and the husband had in his answer made a charge of adultery. The Commissioner who heard the case dismissed both petition and answer. He had by no means acted as the county court judge of the story was advised to do, but had given a fairly lengthy judgment. Nevertheless, a new trial was ordered because there were not "sufficiently precise findings of fact." [3] The Commissioner had recited the evidence dealing with the wife's allegations of cruelty: with regard to a particular incident of alleged assault described as the crux of the case on cruelty, he had said that there was no doubt that the wife had very greatly exaggerated what had occurred. Hodson L.J. said: "He had arrived at no conclusions at all as to what on six or seven occasions had in fact happened." With regard to the particular incident he said: "The Commissioner's duty was to make up his mind one way or the other whether that incident was, as the husband said, an accident, or whether it was, as the wife said, an intentional assault and he had failed to do his duty in that respect. Unless he did make up his mind one way or the other on that primary matter, the court was quite unable to deal with it, nor could any proper judgment be reached on this or any case which depended on findings of facts." [4] The Commissioner's dismissal of the husband's answer was similarly criticised.

What in fact Hodson L.J. had before him was a judgment which did not expressly state the findings of fact. This does not logically entail any absence by the Commissioner of a failure to "make up his mind." He may have made up his mind and failed to articulate clearly his finding. Whether from the "primary fact" of the judgment an "inference of fact" could be made that the Commissioner had failed "to make up his mind" is itself, *ex hypothesi*, a question of fact, about which comment is inappropriate in the absence of a full report of the Commissioner's judgment. Some

[1] See (1957) 20 M.L.R. p. 285. There may, of course, be statutory requirements for speaking orders. For example, reg. 13 (1) of the National Insurance (Industrial Injuries) (Determination of Claims and Questions) Regulations, 1948, provides that "A tribunal shall . . . include in such record . . . a statement of the reasons for their decision, including their findings on all questions of fact material to the decision." (See *Re Gilmore's Application* [1957] 1 All E.R. 796.) The need for reasoned judgments by administrative tribunals is, of course, emphasized by the Franks report on administrative tribunals.

[2] *The Times*, June 5, 1957. This does not appear to be reported in any other report, but I have checked the report in *The Times* with the transcript made by the *Official Shorthanders, Ltd.*

[3] The quoted phrase is taken from the statement made by Hodson L.J. *arguendo*.

[4] This is an extract from the report in *The Times*: it put accurately into indirect speech what the Lord Justice said.

people consider it polite, and others witty, to express a denial of a story in the phraseology of its exaggeration. This was the language of Mark Twain with reference to the report of his death. It would appear, however, that the Court of Appeal, despite the passages about subjective determination, require specific statements to be made by the trial judge as to his findings of fact. In the course of argument Hodson L.J. said: "It is very often a matter of complaint in this court that there are not sufficiently precise findings of fact." To this Mr. Parris, of counsel for the husband, replied: "If a judge in general terms expresses a view as to what facts he does or does not accept, it is not necessary to go through each particular," and Hodson L.J. said: "I agree, but he must surely do something." In dealing with the Commissioner's dismissal of the husband's charge Hodson L.J. said: "The Commissioner had not given the court or the parties the benefit of saying whether or not he accepted the facts as sworn to by those corroborating witnesses." A requirement that a judge must make up his mind about material facts needs no authority: a requirement that he must make up his mind about all the issues of fact argued before him whether or no he thinks them material is surely contrary to authority. The novel requirement for judicial practice which may be contained in the judgment of Hodson L.J. is that a judge must not merely make up his mind about material facts, but state his findings of fact as a reason for his decision. This is neither supported by nor contrary to authority.

The only authority cited by Hodson L.J. is the case of *Jones* v. *National Coal Board*.[5] In that case the court refused to uphold a decision of a trial judge, and one of the reasons for refusing to do so was that the court had "not the material for the purpose. We have some of the primary facts, but not all of those necessary to a decision."[6] But the gist of that case was that the court ordered a new trial because of the undue intervention of the trial judge: there had been no fair trial. There is nothing in the judgment of the Court of Appeal to suggest that if there had been a fair trial the decision of the trial judge would have been set aside because of the inadequacy of the findings of fact. I do not think Hodson L.J. is correct in affirming that it was said in *Jones*' case that the Court of Appeal could only do justice between the parties if it was satisfied that the primary facts had been properly found by the trial judge. But even if he were correct, and such a statement had been made by the Court of Appeal, it is in my opinion fallacious to infer from such a statement that a Court of Appeal would hold that a trial judge in a fair trial had not properly found the primary facts because there was no express statement by him with regard to all of them. The whole of the remarks of the Court of Appeal turned on the propriety of the findings, on the fairness of the trial.

[5] [1957] 2 W.L.R. 760; [1957] 2 All E.R. 155.
[6] [1957] 2 All E.R. at p. 160H.

Whether or no greater formality of judgments will help the administration of justice is not certain. The laconic motivations of some French judgments compare unfavourably with the elaborate reasoning of judgments in our courts. A requirement of specific findings of facts may open the way to unnecessary appeals of a technical character. Much analysis of the problem is still required to enable workable criteria to be developed as to what are the "primary facts" about which the judge has to express a finding. Nevertheless, not only for the purposes of appellate work, but also that justice may appear to be done, it is important that litigants should know what are the findings of fact on which a judge has based his decision. It will be interesting to see the future development of the law initiated by *Craven* v. *Craven*.[7]

J. L. MONTROSE.

THE RESTRICTIVE TRADE PRACTICES ACT IN COURT

THE question of whether a restrictive trading agreement falls to be registered under the 1956 Act is determinable by the High Court [1] with appeal to the Court of Appeal and House of Lords. Application to the High Court on such questions may be made either by the Registrar of Restrictive Trading Agreements or by any party to the agreement.[2] In the case of *Re Austin Motor-Car Co. Ltd.'s Agreement*,[3] it was the company that made the application, which came before Upjohn J., who, it may be noted, is one of the newly appointed members of the Restrictive Practices Court.

[7] Two recent cases in which an appellate tribunal has ordered a new trial because of the incompleteness of the judgment of the trial judge may be cited. In the case of *Stringer* v. *Automatic Woodturning Co.* [1956] 1 All E.R. 327, the statement of claim alleged both negligence and breach of statutory duty; Oliver J. held there was a breach of statutory duty, and made no finding with regard to negligence. The Court of Appeal held there was no breach of statutory duty and ordered a new trial of the issue of negligence. There is no suggestion in the judgments that Oliver J. ought to have decided the issue of negligence. In *Levy* v. *Levy* [1957] 1 All E.R. 178, a Divisional Court ordered a new trial by a magistrate where a wife's complaint of her husband's desertion had been dismissed by the magistrates' court without the husband having been called. Collingwood J. said "As it was not clear whether the magistrate ruled as a matter of law that the evidence could not amount to desertion, or whether he was of opinion that the wife's case had no substance in it, the case should be remitted for retrial." The second alternative was a question of fact and, seemingly, the Divisional Court were prepared to accept the magistrate's decision on the question of fact, but they were not prepared to accept a ruling against the wife as a matter of law. In *Craven* v. *Craven* there was only an issue of fact; the Court of Appeal could have said that if there was any evidence to sustain the Commissioner's judgment as based on findings of fact against the wife (on the charge of cruelty) and against the husband (on the charge of adultery), then the judgment must be upheld.

[1] s. 13 (2) (i). All proceedings in the High Court under Part I of the 1956 Act are assigned to the Chancery Division: Rules of the Supreme Court of Judicature (No. 3) 1956, Order LIVJ, r. 2 (1).

[2] s. 13 (2).

[3] [1957] 3 W.L.R. 450. Also reported [1957] 3 All E.R. 62.

The case involved the system of distribution of the Austin Motor Co. and was, therefore, important with regard to similar systems of distribution established by the manufacturers of other durable consumer and branded goods. Beyond this intrinsic significance, the case was peculiarly important as the first on the issue of registrability under the new Act. Before looking at the facts and decision, it is necessary to comment briefly on the meaning of sections 7 (2) and 8 (3), which became leading issues in the *Austin* case.

An agreement must be registered under the Act if at least two parties to the agreement accept "restrictions," not necessarily identical, as defined in section 6 (1). Under section 7 (2), however, in determining whether an agreement for the sale or other supply of goods should be registered, no account must be taken of any statutory restriction relating "exclusively" to "the goods supplied . . . in pursuance of the agreement." This provision applies equally to bilateral and multilateral agreements, and refers, for example, clearly to quota or price maintenance or quality terms about the goods supplied. If an agreement contains section 7 (2) terms only, it plainly will not be registrable; while, if an agreement contains section 7 (2) terms plus other statutory restrictions, the section 7 (2) terms must be cancelled out in one's mind, as it were, and only the remainder of the agreement examined to decide whether it should be registered.

Exempted agreements under section 8 (3) are agreements for the sale or other supply of goods, between two and no more than two parties, who accept restrictions only in respect, broadly, of exclusive dealing: that is, where the supplier grants an exclusive distributorship or agrees to restrict the number of his distributors, while the distributor-buyer agrees to refrain from dealing in "goods of the same description" of other suppliers or to limit himself in some way in dealing in such goods. If a bilateral agreement for the supply of goods contains *only* section 8 (3) terms, it is exempt from registration; if section 8 (3) plus section 7 (2) terms, then it is arguable on the wording of the Act whether there is exemption under section 8 (3), though the Registrar has taken the view that such agreement is exempt on the ground that, since no account shall be taken of section 7 (2) terms, such agreement should properly be treated as if it contained section 8 (3) terms alone.[4] But, if a bilateral agreement for the supply of goods contains section 8 (3) plus section 7 (2) plus other statutory restrictive terms, then, although the section 7 (2) terms may have to be discounted, section 8 (3) no longer applies and exclusive dealing as well as the other terms must be taken into account in deciding whether the agreement is registrable.

[4] In the Notes recently issued by the Registrar of Restrictive Trading Agreements entitled, *Guide to the Registration of Agreements under Part I of the Restrictive Trade Practices Act, 1956*, at p. 8.

Turning, now, to the facts: Austins' system of wholesale and retail distribution was and is based on a division of the country into areas. Within each area cars are distributed through a single area distributor and a number of sub-area dealers and retail dealers, and also registered dealers and stocking traders. The relationship between Austins and its middlemen was previously governed by a network of standard contracts consisting of bilateral agreements between Austins and each area distributor and multilateral agreements among Austins, each area distributor and sub-area dealer, Austins, each distributor, sub-area dealer and retail dealer, and so on. The present was a test application to determine whether the new Austin agreements were subject to registration.

The principal change Austins had made was to transform all the multilateral agreements into bilateral agreements in order to bring them within the potential scope of section 8 (3). Two agreements were before the court as test samples, namely, those between Austins and each area distributor and between Austins and each sub-area dealer.

The full texts of the new agreements are, unfortunately, not reported. From the provisions referred to in the report it appears that the new Austins–distributor agreement includes an express exclusive dealing, section 8 (3) clause on the part of the buyer, plus section 7 (2) clauses (number of vehicles to be purchased annually; discounts; retention of show and demonstration models; and after-sales service, which, it may be argued is not a section 7 (2) term), plus other statutory restrictions (control by Austins of export of secondhand Austin vehicles; the obligation to have regard to the prices in the current issue of the National Used Vehicle Price Book in fixing the part-exchange allowance to be made for secondhand vehicles of any make, which, it is just arguable, may be a section 7 (2) term; and an extra-legal obligation to ensure agreement between dealers regarding the boundaries of their respective areas subject to a reference to Austins in the event of disagreement, from which seems deducible an implied obligation on the distributor's part to keep within his own area).

The new Austin–dealer agreement is similar. It is composed of section 8 (3) clauses (exclusive dealing on the dealer's part and the obligation on the dealer to buy his cars not only from Austins but from any source Austins may nominate, *i.e.*, impliedly, his area distributor), plus section 7 (2) clauses (as above), plus other statutory restrictions (as above, except that, in place of the distributor's extra-legal obligation, the dealer is obliged, acting "as agent" for Austins, to appoint retail dealers and stocking traders in his territory in accordance with Austins' nomination or approval, thus impliedly limiting the retail middlemen with whom the dealer may trade as well as impliedly limiting the area of his trade).

Clearly, all these bilateral agreements operate against an understood background of multilateral arrangements whereby "whether enforceable at law or not . . . the parties . . . accept mutual rights and obligations."[5] For example, it is obviously understood by each distributor and dealer that every other distributor and dealer is trading on the same terms regarding price, quotas, part-exchange, etc., and, in particular, that none will trespass on the others' respective trading territories.

Thus it was, I believe, reasonable to expect at least two main features in the Registrar's arguments in favour of registration and consequently in the judgment. First, there was the question of the implied multilateral arrangement which, had it been accepted by the court, would have disposed of the section 8 (3) issue, this section applying as already mentioned only to bilateral agreements or arrangements. To the treatment of this question by counsel and court I shall come in a moment.

Second, there were, as can be seen, a number of extremely interesting points of statutory interpretation on which the decision might have turned. What is the precise scope of section 7 (2)? Is effect to be given to section 8 (3) if the only other terms are section 7 (2) terms? Did the other clauses mentioned above constitute statutory restrictions within section 6 (1) other than section 7 (2) clauses? On the latter question, there is indeed a somewhat difficult passage in the judgment in which the learned judge seems to have said that in fact there *were* section 6 (1) restrictions as distinct from those in section 7 (2). The passage runs[6]:

> ". . . it is not disputed that section 7 (2) does not prevent Part I of the Act from applying to the multipartite agreements with Austins, for while many conditions appear in these agreements which prima facie are within section 6 (1), but which are to be left out of account as being terms which relate exclusively to the goods supplied (for example, price controls), there are many other terms which do not so relate.
>
> "For example, in the first tripartite form of agreement, clause 7 (a) precludes the dealer from selling or permitting to be sold any vehicle or second-hand, shop-soiled or used vehicle of Austins' manufacture for export outside the United Kingdom without Austins' written permission. Clause 18 (a) provides that where vehicles of any make are taken in part exchange the dealer is to have regard to the prices in the current issue of the National Used Vehicle Price Book. Again, clause 20 compels the dealer to appoint in his territory retail dealers and stocking traders either in accordance with Austins' nomination or in accordance with his own nomination, provided the same be approved by Austins."

Surely, if the new agreements contain section 8 (3) terms plus section 7 (2) terms plus other statutory restrictions, they cannot be

[5] [1957] 3 W.L.R., p. 460.
[6] p. 455.

saved from registration by section 8 (3), but only if it were shown that the other party to the bilateral agreements—Austins—accepted no statutory restriction, express or implied. These points, however, were not argued. Indeed, the Solicitor-General, who appeared for the Registrar, conceded the case on section 8 (3). Despite this, the learned judge went on to consider the section 8 (3) issue. "The Solicitor-General concedes that the new agreements satisfy the conditions contained in section 8 (3) of the Act standing by themselves, and therefore Part I does not prima facie apply to them. Whether that is so is the real question in this case." [7] Then, in a judgment necessarily limited by the arguments, or rather, the absence of arguments, Upjohn J. concluded, surprisingly: "Reading these new agreements alone and without reference to the earlier history of the matter, it is clear that each of them falls within the protection afforded by section 8 (3), and the Solicitor-General does not dispute that." [8]

Nor, again, was the Solicitor-General prepared to press the matter of the implied multilateral arrangement. Perhaps Upjohn J. took too narrow a view of his function in refusing to accept the existence of the multilateral understanding simply from the bilateral agreements looked at in the light of the history of and acknowledged reason for the change made in the form of Austins' agreements.[9] But he was prepared to listen to a submission by the Solicitor-General that the old multilateral arrangement continued in being, supplementing the new agreements, and to rebutting testimony by Austins, their distributors and dealers and to a cross-examination of such testimony by the Solicitor-General. "Such a submission, however, was never made" and "the Solicitor-General disclaimed any desire to conduct . . . such cross-examination." [10]

In sum, therefore, the new Austin agreements were held not to be registrable. It is possible for them now to be referred for investigation to the Monopolies Commission, though such a reference is extremely improbable. And it is equally unlikely that their validity will now be challenged in the ordinary courts as contracts in unreasonable restraint of trade. As one sees it at present, the decision that agreements need not be registered draws in its train the virtual assumption that they may safely be regarded as valid in law.

As a first case on the registration provisions of the 1956 Act, *Austin* could hardly be more puzzling or less satisfactory. So far as the writer is aware, there is no present intention on the part of the Registrar to appeal. One can only fall back on the thought that perhaps a single case does not make a trend.

C. GRUNFELD.

[7] p. 456.
[8] p. 460.
[9] p. 459.
[10] p. 461.

Restraint of Trade—A New Form of Covenant

It is always refreshing to find a novel point arising for decision, especially when it relates to the much litigated field of contracts in restraint of trade. Such a point arose in the recent case of *Kores Manufacturing Co., Ltd.* v. *Kolok Manufacturing Co. Ltd.*,[1] where rival manufacturers operating their businesses in adjacent premises were anxious to prevent mutual competition for the recruitment of workpeople. Instead of following the normal procedure by inserting a clause restricting future employment in the contracts of service of their respective employees, they adopted the novel course of entering into an agreement by which each firm undertook not to engage, without written consent, any person who had been employed by the other company during the previous five years. This agreement was respected by both parties from the time of its formation in 1934 until a dispute arose in 1957 concerning the appointment by the defendants of the plaintiffs' former chief chemist. The plaintiffs sought an injunction to prevent a breach of the 1934 agreement, while the defendants on their part contended, *inter alia*, that the agreement was void as being in unreasonable restraint of trade and contrary to public policy.

The interesting point about this case is the approach to the problem adopted by the trial judge, Lloyd-Jacob J., who acted as chairman of the 1949 committee on restraint of trade. He first seeks to ascertain the proprietary interest which the employers sought to protect by imposing the restraint, and apparently concludes that this does not consist of trade secrets, since no attempt is made to restrict employees from taking employment with other competing firms in the area. In his view the employers are primarily seeking to avoid competition between themselves for the recruitment of labour. Assuming for the purposes of the decision that such an interest might legitimately be protected, he turns to the problem of the reasonableness of the restraint and adopts the classic test propounded by Lord Parker in *Herbert Morris, Ltd.* v. *Saxelby*[2]—namely, is the restraint reasonable in the interests of the parties themselves and also in the interests of the public?

Dealing with the first branch of the test, Lloyd-Jacob J. reaches the conclusion that the period of five years is unreasonably long to gain the object desired by the parties. In his opinion a denial of engagement in his own trade for a period of six months in the case of a manual worker, and for twenty-one months in the case of an assistant works manager, would be sufficient to discourage the respective employees from transferring from one firm to the other. Consequently, the imposition of a uniform five year ban on all employees must necessarily be unreasonable. Turning to the question of the public interest, the trial judge finds the restraint

[1] [1957] 3 All E.R. 158; [1957] 1 W.L.R. 1012.
[2] [1916] 1 A.C. 688, at p. 707.

equally objectionable. In the first place, if the parties had sought to enforce it during wartime, when government direction of labour was in operation, it would have produced a public mischief. Secondly, the terms of the restraint are so wide as to render it capable of enforcement even though the employer has no legitimate interest to protect. It is one thing to prevent a competitor from enticing away a rival's workpeople, but it is a different proposition when that competitor is prevented from engaging workpeople merely because they have been employed by the rival firm during the past five years—especially when there is no possibility of the latter offering them alternative employment. Such a restriction would be contrary to public policy as constituting " a fetter on the freedom of the workman to offer his labour where he wished, and this a fetter which no interest of the employers necessarily required for their protection."

There can be no doubt that a refusal to enforce the agreement is justified on the facts of the case, but two interesting problems arise from a close examination of the reasoning adopted to reach this result. The interest of the employers which is sought to be protected in this case is clearly the stability of their respective labour supplies by the avoidance of mutual competition for workpeople. Is this a proprietary interest which the employer is legitimately entitled to protect ? The case is obviously treated as being on a par with the normal employer-employee covenant, and in the latter situation the judgment of Lord Parker in *Herbert Morris, Ltd.* v. *Saxelby*[3] had previously been accepted as authority for the view that the only two proprietary interests legally capable of protection were trade secrets and a business connection. Must we now add a third category to the list ? Lloyd-Jacob J. is careful to state that he assumes, without deciding the point, that a proprietary interest does exist, but his concentration on the reasonableness of the length of the restraint tends to support the view that there is at least an arguable case in support of the recognition of such an interest. Otherwise it would have been far simpler to have rejected the case outright on the ground that the contract was void as constituting a mere restraint against competition *per se*.

It may be argued, however, that different considerations apply to a restraint imposed by mutual agreement between employers as opposed to a similar agreement between employer and employee. The validity of this argument may be tested by a slight variation in the facts of the case. Let us suppose that the plaintiffs, instead of concluding the present agreement with the defendants, had inserted a term in the contract of service of each of their employees to the effect that after the termination of their employment with the plaintiffs they should not work for the defendants for a certain

[3] *Ibid.*, p. 709.

period of time. There seems little doubt that in this situation, if the courts maintain their established attitude towards covenants between employer and employee, the restraint would be held void if it was designed to protect not trade secrets or a business connection but merely the employer's supply of labour. Yet the effect and object of these covenants would be precisely the same as in the present contract. Consequently, the effect of accepting an extension of the proprietary interests which may legally be protected in an agreement between employers would be to allow the employer to achieve indirectly an object which he is not permitted to achieve directly by agreement with his employee.

The second point arising from the case relates to the operation of the condition that for a restraint to be valid it must be reasonable in the interests of the contracting parties. If the procedure adopted in the present case becomes widespread, then this formula will not be adequate to cover the interests of the employees, who are, in fact, the persons primarily affected by the agreement although they are not parties to it. An investigation into the protection of their interests could now be more appropriately conducted while the court is considering the reasonableness of the restraint in the interest of the public. It is noticeable that this is the course adopted by Lloyd-Jacob J., who concludes that the agreement in the present case is an unreasonable " fetter on the freedom of the workman to offer his labour where he wished."

This approach gives a new importance to the public interest concept (which has previously been rarely invoked, and then only in terms of restraints injurious to the public at large, such as those tending to create monopolies). If the number of such agreements between employers increases there will be need to qualify the rule that the onus of proving that the restraint is injurious to the public rests with the covenantor, and the view of Lord Parker that " once the court is satisfied that the restraint is reasonable as between the parties, this onus will be no light one." (*Att.-Gen. of Australia* v. *Adelaide Steamship Co., Ltd.*[4]) It may even be necessary to devise a means by which the validity of such a contract can be tested in the courts by the persons affected by it, even though they may not be parties to it.

J. F. Wilson.

More Uncommon Law

It appears to have been settled in *Taczanowska* v. *Taczanowski*[1] by the Court of Appeal that the validity of a foreign marriage as regards form is generally governed by the rule *locus regit actum*; that the basis of that rule is that the parties are presumed to have

[4] [1913] A.C. 781, at p. 797.

[1] [1957] 2 All E.R. 563, C.A.; noted, disapprovingly, by O. M. Stone (1957) 20 M.L.R. 563.

subjected themselves to the local law; that a party can rebut that presumption by evidence; that, having done so, he may at once invite the court to test the validity of his marriage by the standards of English common law, and that an English common law marriage knows of no distinction of race and nationality. As Sachs J. has pointed out in *Kochanski* v. *Kochanska*,[2] there have been, up till now, two distinct types[3] of case where English courts have held marriages to be valid at common law. The first is where the marriage is in an occupied country of a member of the Occupying Forces, as was the case in *Taczanowska* v. *Taczanowski*.[4] The second is where[5]:

> "persons are, in effect, so marooned that there is no set of formalities in the relevant area with which they can reasonably comply.[6] This category covers, for instance, areas in which no such set of formalities has ever existed,[7] areas where chaos has so supervened that conformity is a matter of insuperable difficulty (*Savenis* v. *Savenis*[8]), and areas where conformity would go contrary to the conscience."[9]

The facts in the *Kochanski* case[10] form a new category; the parties—a Polish Army lieutenant and a nursing sister of charity—were domiciled Polish nationals who had been liberated by the Russians in April, 1945, from their prison camp near Nuremburg

[2] [1957] 3 W.L.R. 619; also reported at [1957] 3 All E.R. 142. Noted, L. J. Blom-Cooper (1957) 20 M.L.R. 641.

[3] *Ibid.*, at p. 622.

[4] *Supra.*

[5] [1957] 3 W.L.R. at p. 622. The learned judge, surprisingly, does not refer to the *Maclean* v. *Cristall* (1849) 7 Notes of Cases, Supp. xvii, Supreme Court of Judicature; *Wolfenden* v. *Wolfenden* [1945] P. 61; *Penhas* v. *Eng* [1953] A.C. 304 line of cases, which, strictly speaking, is relevant. The reason for this omission is probably that, as Hodson L.J. pointed out in the *Taczanowska Case* [1957] 2 All E.R. at p. 573, and also Parker L.J. at p. 574, these cases form mere apparent exceptions, their *ratio decidendi* being that British subjects took with them to a British colony so much of the common law as was applicable to their present situation, so that the law applied was really the *lex loci.*

[6] *e.g.*, if, as Wolff, *Private International Law*, 2nd ed., p. 347, says, the country is inhabited by savages.

[7] *e.g.*, if, as Wolff also suggests, *ibid.*, the country is an unoccupied part of the earth, and, for instance, the parties were members of a North Pole expedition: see, too, *Phillips* v. *Phillips* (1922) 38 T.L.R. 150 (marriage in remote part of China conducted by Church of England priest held to be valid common law marriage).

[8] (1950) S.A.S.R. 309, noted by J. G. Fleming, 4 I.L.Q. 500. It is unfortunate that his strictures and the fact that Napier C.J. in *Fokas* v. *Fokas* (1952) S.A.S.R. 152 expressed apprehension as to the correctness of the *Savenis* case were not brought to the attention of either the Court of Appeal or Karminski J. in the *Taczanowska* case or Sachs J. in this. In the *Savenis* case a marriage in a Catholic German church of two domiciled Lithuanian nationals was held valid at common law because, owing to the advance of the Russian armies, all the civil registrars had fled, thus rendering compliance with local law impossible, since it required a civil ceremony to be held.

[9] *e.g.*, if the only local form is non-Christian, as in Siam; this is the example given by Cheshire, *Private International Law*, 5th ed., p. 329. Also if, as Wolff, *loc cit.*, states, the only local form is a religious one and the parties belong to different religions or none at all.

[10] *Supra.*

and had shortly afterwards gone to a displaced persons camp containing some five thousand of their fellow countrymen in Nordheim in the British zone of Germany. Life in this camp appears to have been organised along quasi-military lines and one of the cardinal rules to have been to keep completely aloof from the Germans. It seems that this "force" could not be held to be part of the Occupying Forces; that its colonel had no superior officer in the accepted sense of that expression and that he would not have accepted any orders from any Polish Government. The Catholics of this "force" were in the habit of using the same church as the local German populace, but the services were taken by their own Polish chaplain. The church was also used by both Germans and Poles for solemnising marriages, and, on June 10, 1945, the parties were married in it by the Polish chaplain. The marriage deliberately did not conform to German law, although conformity would have been possible without difficulty at that time. The reason why the parties proceeded thus was probably because their community life was based on keeping apart from the Germans and partly because the community leaders would have advised that, according to Polish law, the celebration was valid by Polish law. By the then Polish law, a marriage of Polish nationals born in Poland taking place outside Poland would, in fact, be valid if celebrated according to the *lex loci* or if celebrated by a religious ceremony such as that which was performed in the Nordheim parish church.

Shortly after the marriage, the wife left the husband, who became domiciled in this country in 1953. In 1956, he brought proceedings against his wife for divorce on the grounds of desertion; the suit was undefended and the Queen's Proctor was not represented.

Sachs J. said that once it was appreciated that, in the case of a marriage such as this, an issue of fact can arise as to whether, in the circumstances, the presumption of subjection to local law has been rebutted, it no longer mattered whether the set of circumstances happened to fall into a category that had already been decided upon, though a court would always be slow to allow exceptions to the universal and certain *locus regit actum* rule.[11] This note of caution "seems especially necessary," he said, "when one considers the almost infinitely variable sets of circumstances that may arise in modern conditions where there are to be found resistance movements, concentration camps, prisoners of war, camps of displaced persons, and groups of persons who may by divers methods be prevented from leaving the country in which they are."[12] Confining himself to the present situation, he pointed out that the parties were not voluntarily in Germany; war conditions prevented their going where they wished; they based their

[11] [1957] 3 W.L.R. at p. 623.
[12] *Ibid.*

life on having nothing to do with those who formerly held them in captivity and caused them suffering, and that to hold that they had subjected themselves to German law would be an odd conclusion.[13] The way being thus open to hold the marriage valid at common law, the judge immediately held that it was, the necessary conditions having been satisfied.[14]

Counsel for the husband had relied solely on the contention that the marriage was valid at common law as he felt unable to press a claim that it was valid by the law of Poland and therefore ought to be regarded as valid here. The judge explained this when he justified his immediate application of the common law.[15] Until the *Taczanowska* case,[16] it had been settled that where there was a foreign marriage in country A between two persons domiciled in country B, an English court would have tested the formal validity of the marriage by the law of country B if the local law of A had proved inapplicable. But, when it appeared in the *Taczanowska* case [17] that the law of country B would hold the marriage formally invalid, the Court of Appeal had held that the common law of England could be immediately applied once the application of the law of country A had been eliminated. At the same time, it was open to that court to have held that the parties should be given the benefit either of the common law or of the law of country B. As Sachs J. pointed out, however, Hodson L.J. had referred to obstacles in the way of applying the law of country B, though he had not rejected it outright [18]; Parker L.J., moreover, had flatly stated that he did not [19] "see any reason why we should look to the law of the domicile of the spouses at the time of the marriage. No doubt English law will look at the law of domicile to determine capacity, but for no other purpose. Indeed, if English law were to look to the law of the domicile, what would be the position where the two spouses had different domiciles? In my judgment there is no authority or reason which requires us to look to any other law, once the *lex loci* is inapplicable."

That passage, Sachs J. stated, might "appear to go near to closing the door to" the application of the law of country B, but it might also be read subject to it being addressed to the argument, unsuccessful in the Court of Appeal on those facts, that the courts of this country must look solely to the *lex domicilii* when once the *lex loci* was eliminated and thus in no circumstances could ever be asked to apply the common law.[20] Having found desertion proved, the judge gave a decree nisi.

[13] *Ibid.*
[14] *Ibid.*
[15] [1957] 3 W.L.R. at pp. 624–626.
[16] *Supra.*
[17] *Supra.* The same is true, of course, of the *Savenis* case, since a civil ceremony was required by Lithuanian law (and Soviet Russian law).
[18] [1957] 2 All E.R. at p. 572.
[19] *Ibid.*, at pp. 575–576.
[20] [1957] 3 W.L.R. at p. 625.

While one can appreciate that the marriage in the *Taczanowska* case [21] should have been upheld despite the absence of difficulty in compliance with the law of the conquered *locus celebrationis* because the parties were nationals of an Occupying Force who should not be expected to bend the knee to the laws of the occupied, is it right that parties who are not members of such a force can disregard the laws of their former enemies and allege that their own laws apply? Upon reflection, does not this decision open the way to fraud just as does Dr. Cheshire's "intended matrimonial home" theory governing capacity to marry? Carried to its logical conclusion, this case will mean that we must uphold the marriages of parties belonging to any group of people who live in a community apart who fulfil the requirements of a common law marriage and assert that they did not intend the *lex loci* to apply. We in England would not allow two West Indians living, as many of them do in this country, in a self-contained community to marry here without compliance with English law, so why, *mutatis mutandis*, should we recognise such a marriage abroad? It is to be hoped that this line of cases will be closely watched to see that they do not run riot, and that they will be confined to cases where the parties are subjected to war or warlike conditions rendering them, at the time of their marriage, not masters of their own free will. Subject to this, the rule exemplified in *Kent* v. *Burgess*,[22] that there must be insuperable difficulty in compliance with the local form, must be rigidly followed. Taken at its face value, however, one cannot be surprised at the result of the decision, which is, it is submitted, a policy decision comparable with the otherwise inexplicable case of *H.* v. *H.*[23] It may very well prove that the courts are going to treat these cases with the same generosity as they have shown themselves prepared to do with service men's wills.[24]

P. R. H. Webb.

[21] *Supra.*

[22] (1840) 11 Sim. 361. Two eloping British subjects were married in Belgium, by a Church of England priest, without fulfilling the rather long residence qualification of six months. It was held by Shadwell V.-C. that "there were no insuperable difficulties which prevented a marriage from being had according to the Belgian law; and, therefore, there are no circumstances of exception here which operate to take the marriage out of the general rule, which requires that marriages abroad, in order to be valid, must be celebrated according to the *lex loci*." See, too, Dicey, *Conflict of Laws*, 6th ed., at p. 771, where it is suggested that a court might require to be satisfied that there was no suitable person to celebrate a marriage or that it was not possible for the parties to take advantage of the Foreign Marriage Acts before it would hold a marriage valid at common law.

[23] [1953] 3 W.L.R. 849; [1954] P. 258, noted O. M. Stone (1954) 17 M.L.R. 149. Perhaps this realist approach goes back to *May* v. *May* [1943] 2 All E.R. 146; *Cruh* v. *Cruh* [1945] 2 All E.R. 545, and *Igra* v. *Igra* [1951] P. 404.

[24] See the decision of the Court of Appeal in *Re Wingham, decd.* [1949] P. 187, especially *per* Denning L.J. (as he then was) at pp. 195–196. Indeed, perhaps the secret of these common law marriage cases is that the husbands have been "in active military service" as defined in *Re Wingham* at the time of their marriages.

RE BANQUE DES MARCHANDS DE MOSCOU

THE winding up of the Banque des Marchands de Moscou seems to be nearly over. The recent decision of Roxburgh J. in *Re Banque des Marchands de Moscou*[1] is the seventh reported case[2] to arise from the liquidation, and involved the question of who is to succeed to the surplus assets in the English liquidation of a dissolved foreign corporation. The material facts as conceded or found by the learned judge may be shortly stated. The bank was incorporated under the law of Tsarist Russia as a company limited by shares, and became a victim of the policy of nationalisation adopted by the Soviets in the period 1917–1918. That policy was not implemented by the method familiar in England, *viz.*, the compulsory acquisition of all shares in the bank. Instead, the bank was dissolved and its assets vested in the State Bank of the Russian Republic. An English winding-up order was made in May, 1932, under what is now section 399 (5) (*a*) of the Companies Act, 1948, and the order was expressed to be "without prejudice to the claim of the Crown to any of the assets of the [bank] which may have become *bona vacantia*." The liquidator succeeded in obtaining payment[3] of a substantial sum which had been owed to the bank by an English bank[4] and after dealing with all proofs of debt and liquidation expenses he found that he held a surplus of some £50,000.

The Crown claimed the surplus as *bona vacantia*. Undoubtedly the dissolution of a foreign corporation automatically vests all of its English assets in the Crown,[5] and the vesting is not affected by a foreign government's confiscation of those assets since the confiscation will not be recognised as regards property situate in England.[6] However, the Companies Act, 1948, empowers the court to wind up a dissolved foreign company,[7] and if an order is made all the provisions of that Act relating to a winding up by the court are applicable.[8] In *Re Azoff-Don Commercial Bank*,[9] Wynn-Parry J. held that to give the provisions of the Companies Act the effect which the legislature intended, involved treating

[1] [1957] 3 W.L.R. 637; [1957] 3 All E.R. 182.
[2] See [1939] 2 All E.R. 364 (C.A.); [1949] W.N. 308 (H.L.); [1951] Ch. 112 (C.A.); [1952] 1 All E.R. 1269; [1953] 1 W.L.R. 172; [1954] 1 W.L.R. 1108.
[3] The preliminary stages in the action (subsequently settled) in which payment was sought, are reported *sub nom. Banque des Marchands de Moscou and the Att.-Gen.* v. *Midland Bank* [1939] 2 All E.R. 364 (C.A.).
[4] Since the debt was situate in England it was not subject to the legislation confiscating the bank's assets, *cf. Bank voor Handel en Scheepvaart* v. *Slatford* [1953] 1 Q.B. 248.
[5] This is clearly indicated by *Re Banque Industrielle de Moscou* [1952] Ch. 919; *Re Azoff-Don Commercial Bank* [1954] Ch. 315. See M. Mann (1955) 18 M.L.R. 8, 11–12.
[6] *Bank voor Handel en Scheepvaart* v. *Slatford* [1953] 1 Q.B. 248.
[7] ss. 399 (5) (*a*) and 400. See Lipstein (1952) 11 C.L.J. 198.
[8] ss. 399 (1) and 404.
[9] [1954] Ch. 315. See M. Mann (1954) 3 I.C.L.Q. 689.

them as limiting the Crown's prerogative right at least so far as was necessary to collect the assets of a dissolved company and distribute them amongst its creditors. In the present case Roxburgh J. thought that Wynn-Parry J.'s reasoning was equally applicable to those provisions of the Companies Act dealing with the distribution of the surplus assets which are "no less mandatory than those affecting creditors."[10] Section 265 of the 1948 Act provides that the court "shall . . . distribute any surplus assets among the persons entitled thereto." If there are no persons "entitled" to the assets then when the company is dissolved on completion of the liquidation[11] they will vest in the Crown under section 354 of the Act.[12] Once, as seemed to be inevitable, these two provisions were construed as excluding the Crown's prerogative right, it followed that the reservation in the winding-up order preserving the claim of the Crown was devoid of effect for "By force of the statute itself, which is imperative, the title of the Crown is postponed to persons entitled to surplus assets."[13]

There does not appear to be any reported English case dealing with the question of who is "entitled" to the surplus assets on completion of the liquidation of a foreign corporation.[14] However, it seems clear in principle that the entitlement can only be one bestowed by the law of the country of incorporation and Roxburgh J. so decided without the least hesitation.[15] The evidence of Russian law was that subject to the prior rights of creditors the dissolution of the bank automatically vested all of its assets into the common ownership of the shareholders, and accordingly the liquidator was directed to discover whether there were any former shareholders who could prove their title. The direction seems, with respect, to have been entirely correct, but it should be noted that the scope of the decision is a restricted one. It does not deal with cases where either the shareholders' right of participation has been attacked by a decree of confiscation or where the government which has effected the dissolution itself lays claim to the assets. These questions have been discussed elsewhere in this *Review*.[16]

Michael Mann.

[10] [1957] 3 W.L.R., at p. 645.

[11] s. 274.

[12] *Re Azoff-Don Commercial Bank* [1954] Ch. 315, 329. The Crown can disclaim under s. 355 (1). On the effect of disclaimer see Elliott (1954) 70 L.Q.R. 25.

[13] [1957] 3 W.L.R., at p. 646. The effect of reservations which are or may be inconsistent with the provisions of the Companies Act has been recently considered in *Re Hibernian Merchants Ltd.* [1957] 3 W.L.R. 486. See also *Re Moscow Merchants Trading Co., Ltd.* [1957] 3 W.L.R. 637, 654.

[14] See the present writer's article, "The Dissolved Foreign Corporation" (1955) 18 M.L.R. 8, 30–31, where the position is fully discussed.

[15] "As this was a Russian corporation . . . title must be made under the same law" ([1957] 3 W.L.R., at p. 646).

[16] (1955) 18 M.L.R. 8, 30–31.

DAMAGES FOR LOSS OF CONSORTIUM

IN *Kirkham* v. *Boughey*,[1] the plaintiffs, husband and wife, while on holiday in England, were injured in a motor accident by the defendant's negligence. The husband's injuries were slight, but the wife had to spend four months in hospital, during which time the husband stayed in England with his two young children in order to be near his wife instead of returning to his well-paid job in West Africa. The point at issue was whether the husband was entitled to damages for loss of earnings during such period as the judge should find that it was reasonable for him to have stayed in England.

There was some support for the husband's claim in the recent decision of Devlin J. in *Behrens* v. *Bertram Mills Circus, Ltd.*,[2] in which he held that a husband was entitled to recover as damages for loss of his wife's consortium his loss of earnings during her incapacity. Devlin J. recognised the comparative novelty of such a claim, but thought that if, as he held, it was reasonable for the husband in the special circumstances of the case to forgo his earnings in order to be near his wife, he was entitled on general principle to be put in as good a position as if the wrong had not been done to him.

In *Kirkham* v. *Boughey*, however, counsel for the husband based his claim, not on the ground that the husband's loss of earnings resulted from the loss of his wife's consortium, but on the far wider contention that the defendant was liable to any member of the family circle of a person injured by his negligence for any loss or expense reasonably incurred as the result of the accident. In view of what was said by the House of Lords in *Best* v. *Samuel Fox & Co., Ltd.*,[3] and by Devlin J. himself in *Burgess* v. *Florence Nightingale Hospital*[4] regarding the general inability of one person to recover damages for pecuniary loss resulting from injury to another, it is not surprising that Diplock J. should have denied the existence of any such wide principle. Though it was reasonable, so he held, for the husband to have stayed in England until his wife was well again, yet his loss of earnings was *damnum absque injuria*.

The report does not make clear why counsel for the husband did not base his claim on loss of consortium, nor whether Diplock J. would have upheld the claim if based on that ground. Though he was able to distinguish *Behrens*' case as having been based on loss of consortium and thought that it might be supported on that ground, it is clear that he thought certain passages from Devlin J.'s judgment hardly reconcilable with the speeches of the Law Lords in *Best* v. *Samuel Fox & Co., Ltd.* Thus, though he did not dissent from Devlin J.'s proposition that the assessment of damages in a claim for loss of consortium must be governed by general

[1] [1957] 3 W.L.R. 626; [1957] 3 All E.R. 153.
[2] [1957] 2 Q.B. 1.
[3] [1952] A.C. 716.
[4] [1955] 1 Q.B. 349.

principles and that the plaintiff, provided he acted reasonably, is entitled to be placed in as good a position as if the wrong had not been done to him, this must, he pointed out, be read subject to the qualification that the only "wrong" done to the husband of which the law could take account was the invasion of his quasi-proprietary interest in his wife's consortium.

In *Best* v. *Samuel Fox & Co., Ltd.*, the right of a husband to recover damages for loss of consortium was described by the House of Lords as an anomaly, and the House refused to extend the anomaly by allowing a similar right of action to a wife deprived of her husband's consortium. It might therefore be said that the decision of Devlin J. in *Behrens'* case, in allowing a novel claim, was out of harmony with the House of Lords' decision. But, even allowing the exceptional nature of the husband's right of action for loss of consortium, there is much to be said for Devlin J.'s decision. The relation between husband and wife is a unique one, in the protection of which society has a clear interest, and though it may be impracticable, and indeed unjust, as a general rule to hold a defendant who has by negligence inflicted personal injuries on one person liable for the injurious consequences to others, sound policy would seem to support an exception to this rule in favour of a claim by a husband in respect of injuries to his wife. If the family as a social unit has suffered pecuniary loss as the result of the defendant's negligence, the defendant should pay—as indeed he does under the Fatal Accidents Act if the injuries result in death. The courts ought not to be embarrassed by the so-called anomalous character of the husband's right of action.

It is, of course, too late now to contend that a wife or child has a corresponding right of action in respect of injuries to a husband or father. But this is no reason for restricting the admitted right of the husband. The denial of a right of action to a wife or child will seldom cause hardship, at least as regards pecuniary loss, since even today it is the husband who is usually the breadwinner. When a man is injured by the negligence of another, it is rare for his wife or children to suffer consequential pecuniary loss which is not compensated for in the award of damages to him. And if he is killed, their interests are of course protected by the Fatal Accidents Act.

Douglas Payne.

Progress Towards a Jus Quaesitum Tertio by Way of Contract

The judgment of Devlin J. in *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.*,[1] and several judgments of Denning L.J. (as he then was), in such cases as *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*,[2] in which they advanced a

[1] [1954] 2 Q.B. 402.

[2] [1949] 2 K.B. 500.

common law principle of *jus quaesitum tertio* by way of contract, were examined last year in an article in 19 M.L.R. at pp. 374 *et seq*. The conclusions reached were that such a development was desirable in English law but that the aid of Parliament was needed. So a plea was made for the reconsideration of Section D of the 1937 Report of the Law Revision Committee. While no further progress has been made in England the Irish Parliament has acted on some of these proposals.

The occasion has been the enactment of several overdue law reforms affecting married women in the Married Women's Status Act, No. 5 of 1957, the general effect of which is to bring the Irish law on their status more closely into line with the modern English law:—*cf*. Law Reform (Married Women and Tortfeasors) Act, 1935, and Married Women (Restraint upon Anticipation) Act, 1949. But in two particulars the Irish Act now goes further than the corresponding English statutes. *First*, section 7 of the Act of 1957, which replaces section 11 of the Married Women's Property Act, 1882, applies not only to a policy of life assurance but also to an endowment policy, and to either whether "expressed to be for the benefit of" or "by its express terms purporting to confer a benefit upon" the wife, husband or child of the insured: such policies are to create trusts in favour of the objects named. *Second*, section 8 of the Act of 1957 creates a new species of third party rights by way of contract: it runs:—

> "(1) When a contract (other than a contract to which section 7 applies) is expressed to be for the benefit of, or by its express terms purports to confer a benefit upon, a third person being the wife, husband or child of one of the contracting parties, it shall be enforceable by the third person in his or her own name as if he or she were a party to it.
>
> "(2) The right conferred on a third person by this section shall be subject to any defence that would have been valid between the parties to the contract.
>
> "(3) Unless the contract otherwise provides, it may be rescinded by agreement of the contracting parties at any time before the third person has adopted it either expressly or by conduct."

These sections of the Act of 1957 were intended to implement the tenth proposal in the Law Revision Committee's Report (*i.e.*, § 49 and § 50 (10)). But in the result a much wider range of family contracts are affected and third party rights are created by way of contract as well as by way of trust. Still the recommendation of a general *jus quaesitum tertio* by way of contract, embodied in the ninth proposal of the Law Revision Committee's Report, has not been acted on by the Irish or the English Parliaments. As the Law Reform Committee has reconsidered and acted on section A of the 1937 Report so it might at least reconsider section D in the light of these post-war developments.

F. E. DOWRICK.

REVIEWS

THE LAW OF RESTRICTIVE PRACTICES AND MONOPOLIES. By R. O. WILBERFORCE, Q.C., ALAN CAMPBELL, M.A., and NEIL P. M. ELLES, M.A. Consulting Editor, R. GRESHAM COOKE, C.B.E., M.P. [London: Sweet & Maxwell, Ltd. 1957. xxiv and 677 pp. £4 4s. net.]

MONOPOLIES AND RESTRICTIVE TRADE PRACTICES. By MICHAEL ALBERY, Q.C. and C. F. FLETCHER-COOKE, M.P. [London: Stevens & Sons, Ltd. 1956. xvi and 185 pp. 27s. 6d. net.]

THE authors of one of these books comment on one subsection (s. 7 (2)) of the recent Restrictive Trade Practices Act: "Whether or not this subsection is intelligible to business men, it is certainly calculated to create difficulties for lawyers" (Wilberforce, p. 298). Business men and other laymen are likely to say the same about it, transposing the two operative nouns. And the discussion in these two books makes it clear that the same sort of comment applies equally to many other important sections of an Act which may have far-reaching effects on the economy and on particular branches of industry and trade. Many important issues will only be clarified when there has been a body of interpretative decisions both in the ordinary courts (*e.g.*, on the registrability of agreements and the interpretation of parts of Part II covering resale price maintenance) and in the new Restrictive Practices Court (on the crucial but enigmatic section 21).

In the meantime both teams of authors have tried manfully to translate the bare words of the Act into more immediately comprehensible and concrete terms. The results of their endeavours are likely to be helpful. No one reading either of the two works can fail to have his eyes opened to possible interpretations or implications which had been missed previously. In this respect lawyers actively concerned with the legislation will find it useful to consult both the works, since they sometimes supplement one another and on occasion suggest conflicting interpretations. The practical utility of the volumes is not reduced by the fact that sometimes the authors have to concede victory to the draftsmen responsible for the words used in the Act. The word "specific" in particular has caused understandable difficulty. Of its use in section 6 (7) ["specific recommendations" made by trade associations] Wilberforce *et al.* write: "It is not clear what significance (if any) is to be attached to the word 'specific' since it is difficult to see how any recommendation, which is not void for uncertainty, can fail to be specific. The conception of a specific implied recommendation is even more difficult" (p. 291). Of the use of the word in section 21 (1) (*b*) ["specific benefits or advantages" to consumers], Albery and Fletcher-Cooke comment: "in this context it smacks more of journalism than of the law" (p. 46). But one of their tentative interpretations that it connotes "short term" rather than "long term" seems to have little to commend it. The Monopolies Commission, it may be noted, have on occasion considered some long-term benefits to be sufficiently valuable to condone a restrictive practice.

In the space of a review it is not possible to consider all the points of interest or controversy which are raised by these two books. Instead, one topic is selected for detailed comment—the important section 21.

Section 21 provides, broadly, that in any proceedings before the Restrictive Practices Court a registered agreement shall be deemed to be against the

public interest unless the court is satisfied both that the agreement falls within the scope of one (or more) of seven specified "justifications," and also that the benefits of the agreement outweigh its detrimental effects. In very rough terms the seven tests (the seven so-called gateways) require, respectively, that the agreement is necessary for (a) the protection of the public from injury, (b) the provision of some other "specific and substantial" benefits to consumers, (c) the countering of the restrictive measures of a monopolist, (d) the safeguarding of the negotiation of "fair terms" with a preponderant buyer (or seller), (e) the avoidance of serious and persistent unemployment, (f) the maintenance of export earnings, and (g) the effective maintenance of another restrictive agreement.

Albery and Fletcher-Cooke deal with this section informatively in a straightforward and uncomplicated manner. *Inter alia*, they make the interesting suggestion (p. 56) that the wording of the second part of the section (the so-called tailpiece) may be construed so as to shift the burden of proof from the parties to the agreement, once they have justified the agreement. But perhaps the question of the location of the onus of proof will not be important in practice, since at critical points the argument will almost inevitably be concerned more with the appropriate hypotheses or presuppositions (concerning the effects of competition) to be invoked or the appropriate set of weights (for balancing benefits against detriments) to be used than with statements or assertions that are amenable to direct proof or disproof. The authors also make the interesting point in connection with justification (f) [protection of export earnings] that "'earnings' presumably mean gross receipts and not net earnings; to discover the latter would be an impossibly complicated task" (p. 53). However, the task is no more "impossibly complicated" than the task of establishing other effects of restrictive agreements. Generally, section 21 would seem to involve matters of judgment and opinion; and in this respect it is no more "complicated" to arrive at an opinion on the effects of an agreement on net export earnings than on, say, the negotiation of "fair terms" with a monopolist (justification (d)) or on long-term unemployment (justification (e)). Moreover, from the point of view of an economy with balance-of-payments difficulties, the important magnitude is *net* and not *gross* export earnings. But the Act gives no real guidance here.

Wilberforce *et al.* approach section 21 in an apparently more penetrating manner, but their approach, I believe, is not helpful. They submit, in effect, that "with certain important reservations" "the general purpose of the Act" is "to promote conditions of increased competition in trade in goods," and that this "general purpose" supplies a workable criterion for the adjudication of registered agreements (p. 363). (For purposes of discussion we may accept this inference of the general purpose of Part I of the Act, though this purpose is not mentioned specifically in the Act. It should be noted that some agreements which do not affect competition may be registrable, *e.g.*, a simple agreement among manufacturers not to raise their individually determined prices during a period of inflation.) Clearly, much will depend upon the reservations. Here the authors make a distinction. The reservations implicit in justifications (a), (e) and (f) [regarding public safety, employment and exports, respectively], they say, "introduce other values [not related to competition at all], the weighing of which against circumstances relating to competition involves a different type of value judgment which is appropriate . . . for a politician, but outside the competence of others, whether economists or lawyers" (p. 367). They suggest, therefore, that when the court is satisfied that an agreement is justified in terms of (a), (e) or (f), this "should be treated as overriding." In other cases, however, "the court will have regard to the general effect [of the agreements] upon competition in the trade concerned" (p. 368).

The distinction is ingenious. But is it really more difficult—or less congenial to the judicial mind—to weigh a reduction of export earnings against the detriments of restrictions than it is to weigh the deprivation of "substantial

and specific" benefits to consumers against the detriments of restrictions? Both assessments are difficult and raise issues which would seem to lie outside the range of issues more commonly considered in courts of law. And the Act is quite specific in entrusting the task of making these and other assessments to the new court. It seems unlikely that the court will take upon itself the making of a distinction which, if it had been the intention of the legislature, could easily have been made specifically in the Act itself. The authors' standard of "more or less competition" is itself ambiguous. Does an increase of competition in service or quality outweigh a decline of competition in price? And does "competition" mean, in American terminology, "hard" competition or "soft" competition? Issues of this kind may well be faced by the court, and they would seem to be as difficult and remote from ordinary judicial concerns as the other issues already discussed. And, equally, the Act gives no guidance.

Another set of distinctions made by Wilberforce *et al.* also appears to be untenable. They write that justifications (a), (c), (d) and (g) refer to results of agreements "which can be identified with comparative ease and proved by the normal type of evidence used in courts of justice"; (e) and (f), on the other hand, introduce "factors of less immediacy" and involve matters of opinion "on which the views of experts may differ," and which involve "evidence of a broadly speculative character"; while with (b) and the balancing of advantages and detriments "a different world altogether is entered" and "more abstract processes of reasoning" will be inevitable (pp. 356–357). We may pass over detailed criticisms of this classification [*e.g.*, will "experts" agree on what constitutes "fair terms," and whether a restriction is "reasonably necessary" to secure them justification (d)?]. A more fundamental criticism is that this classification neglects a feature common to all the specified grounds of justification: the adjudicators have to form an opinion of what is likely to happen in an alternative hypothetical situation, one in which the restrictive agreement in question is eliminated. An "abstract process of reasoning" seems to be called for in all cases, though, no doubt, varying degrees of illumination may be shed by the history and current experiences of different industries.

I have already suggested that lawyers concerned with the new Act will find it helpful to consult both the books under discussion. The layman, however, is likely to find the smaller volume, by Albery and Fletcher-Cooke, more suited to his needs. Indeed, the larger volume owes much of its extra girth to the inclusion of material, both in the text and in the appendices (especially Appendices II, III and VI, occupying about one-fifth of the book), the removal of which, it is suggested, would deny few "specific and substantial benefits" to most readers, laymen or lawyers.

B. S. Yamey.

Nationality and Citizenship Laws of the Commonwealth and of The Republic of Ireland. By Clive Parry, M.A., LL.B., Barrister-at-Law. [London: Stevens & Sons, Ltd. 1957. liv and 1021 pp. £6 6s. net.]

This very large book is a most valuable new work of reference, containing, as it does, a detailed account of the nationality laws (with the texts of all relevant statutes), not merely of the United Kingdom, of the Colonies and of protected states such as Bahrein, Tonga, Kuwait and Qatar, as well as Zanzibar, but also those of all the Sovereign Member States which existed at the time of writing (*i.e.*, not including Ghana or Malaya as such Member States) and of the Irish Republic. This is particularly valuable, as these texts are not readily available in the United Kingdom. Mr. Parry has clearly

been aware of the danger of being overrun by events, and it is proposed to issue supplements to prolong the useful life of the work. A postcard is provided in each copy, whereby the purchaser may send his address to the publishers in this connection. This plan is much to be welcomed, as the inevitably high cost of this book makes the idea of frequent new editions most undesirable, while the subject is clearly one which is rapidly developing, as new Member States arise and adopt their own nationality laws.

The arrangement of the book is admirable, the first Part being a lengthy Introduction (pp. 3–142) dealing with historical and general "background" matter. One is tempted to wonder whether this should not have been pruned a little more drastically, in view of the enormous length of the substantive Parts of the book. In particular, while the author's discussion of "The Quasi-Nationality of Corporations" (pp. 133–142) is interesting and, in part, controversial, this matter is not sufficiently relevant to the main theme of the book to justify its inclusion in the circumstances. In his treatment of *Calvin's* case and the status of the *antenati* and *postnati* in connection with a personal union, Mr. Parry falls into the mistake, common enough among English lawyers, of supposing that there was a "Dutch Union" (p. 45) under our William III, equating it with the personal union with Hanover. While it is true that William III was Stadtholder (strictly *stadhouder*) of Holland, this does *not* mean that the Dutch were his subjects or owed allegiance to him. He was not Head of State (except, perhaps, in Orange—his hereditary principality near Avignon) and in reality the *stadhouder* was the paid servant of the States-General, appointed by, and answerable to, that body, which itself wielded sovereignty in what was then most emphatically the Dutch "Republic" and to which William, like other Dutch citizens, owed allegiance. Only in 1814 did the Dutch reluctantly accept the House of Orange as sovereigns to whom they owed allegiance. As there was thus no allegiance by Dutchmen to William III (nor was he even *stadhouder* over all the Provinces) no questions of personal union arose. But Mr. Parry errs in good company, as he cites a case in which Lord Coleridge C.J. fell into the same trap (p. 46).

Part Two (pp. 145–427) contains the laws of the United Kingdom and Colonies, as well as of other dependencies. The pre-1949 law is first considered in detail—rightly, as many questions under it (regrettably, but perhaps inevitably) can still arise. It will be many years before the nationality lawyer can confine his attention to the British Nationality Act, 1948, alone. This Act is naturally dealt with at length, the method being to set out a section or sections, followed by a detailed commentary and a series of imaginary "Illustrations" of the working of the provisions. These last are no doubt valuable in a work liable to be used as a reference book by non-lawyers, but occasionally they are perhaps too numerous (*e.g.*, pp. 243–244). In dealing with the status of alien women marrying United Kingdom citizens, the 1948 Act mentions "a woman who *has been married* to a citizen." Mr. Parry's discussion of this phrase is particularly interesting (pp. 259–261). One awaits with interest cases on its interpretation. The new rule that such a woman may acquire United Kingdom citizenship by registration on taking the oath of allegiance poses a little social problem overlooked by the Act and Mr. Parry. Unlike a British bride, whose married-name passport may be handed to her by the priest immediately after the wedding, the alien bride must await the formal taking of the oath, which means either proceeding to do this later on the marriage day—which may not be easy, *e.g.*, on Saturday afternoon—or, more probably, departing for the honeymoon with her maiden-name alien passport, which might prove embarrassing!

Part Three (pp. 431–922) deals in turn with the laws of each of the (then) other Member Nations, including Southern Rhodesia, which has, surprisingly, not been affected in this matter by the formation of the Federation of Rhodesia and Nyasaland (p. 748, note 12). A perusal of these citizenship laws is discouraging to those brought up under the illusion—created by the

British Nationality Act, 1914—of a "Common Code," which, as Mr. Parry shows, never was in fact the true position. Although all "Commonwealth citizens" enjoy equality for every purpose with United Kingdom citizens in the law of the United Kingdom and can achieve the latter status by a simple registration as of right after one year's residence, this is not so vice versa, and United Kingdom emigrants to Commonwealth states may have to fulfil practically the same residence test as alien immigrants (*e.g.*, in Australia, p. 566). The reviewer was interested during a recent visit to Canada to learn that the taking of the oath on naturalisation—in England a quick mumble in a private office—is there made the occasion of a ceremony (sometimes televised) in which a group of "New Canadians"—as immigrants are tactfully called—appears before three robed High Court judges, one of whom (often the Chief Justice) makes a speech about the privilege and responsibility of becoming Canadians, to which one of the immigrants replies. Some such ceremony is required by law (1946 Act, s. 33: p. 514). The whole concept of nationality which this implies would tend to lose something if British-born immigrants were treated differently from the rest. In his treatment of India, Mr. Parry discusses the extent to which international law bound the Crown in dealings with the Princes (pp. 838–839). If it was necessary to do this, he should perhaps have mentioned the cases such as *Statham* v. *Statham and the Gaekwar of Baroda*, in which the English courts tended to speak of being bound by international law to grant the Princes sovereign immunity. In each case, the earlier law is rightly considered in some detail before coming to the current law, which is examined exhaustively.

Part Four (pp. 925–996) deals with the Republic of Ireland, whose *sui generis* relationship to the United Kingdom in nationality matters is well known, although it is not necessarily the case that Irishmen enjoy the same privileges in the other Commonwealth states. It is interesting to note that one may acquire Irish citizenship if born abroad of an Irish mother and a non-Irish father, even if the birth is illegitimate (p. 946). The rule in the Commonwealth states is that citizenship (if born abroad) is only to be normally obtained through the father, although some of them allow an illegitimate child to follow its mother's nationality (*e.g.*, Canada, p. 478; Ceylon, p. 801). No such rule prevails in the United Kingdom law.

Among the most vital parts of a reference book of this type are the Index and Tables of Statutes and Cases. These are remarkably thorough and well arranged, having been compiled by the author himself (p. xix). However, the insertion of the Sudan under A as "Anglo-Egyptian" is anachronistic, particularly as there is no cross-reference under S, where, it is suggested, the reader is more likely to look for it.

C. d'Olivier Farran

The Law of Torts. By John G. Fleming. [Sydney: The Law Book Co. of Australasia Pty., Ltd. 1957. 762 pp. £4 4s. net.]

Professor Fleming states in his Preface that he has two main reasons for writing this textbook on Torts. First, his experience as a teacher has convinced him that the older English texts such as *Salmond* and *Winfield* "have signally failed to respond to the dramatic shifts which have occurred in this branch of the law within our generation." In substance he has sought to bridge the gulf between "law in books" and "law in actual operation" by stressing such elements as the impact of insurance on contemporary patterns of liability. He has also cut loose from the traditional English order of arrangement which has always struck him "as highly inconvenient and irrational for pedagogical purposes" and instead he has plunged straight away into a discussion of specific torts. Surely he is right in this, and will

not the old order be obsolete within a decade? Secondly, Professor Fleming has brought together the Australian and New Zealand material.

Recently the opinion has been voiced in different parts of the Commonwealth, and especially by Dean Cecil Wright, that there is a need for a critical survey of Torts which deals with the law in the common-law world as a whole, and perhaps this book may fairly be regarded as an attempt to satisfy that need. It is very useful for the first time to have the Australian decisions worked into a textbook on torts. It is also refreshing to see English decisions examined not only in relation to comparable cases in other parts of the Commonwealth but also in relation to the views on the policy of the law expressed by leading American commentators. The author's mastery of such a vast field is remarkable; the reader is continually stimulated by approaches unfamiliar in a purely English context.

Nevertheless it has always seemed to this reviewer that there are tremendous difficulties in writing a survey of the whole of the common law of torts. First, there is the enormous task of mastering the subject-matter. Professor Fleming has rendered signal service by covering the law of Australia and New Zealand so thoroughly. But it is noticeable that many important Irish and Scottish cases are omitted. Will it ever be possible adequately to cover the whole of the Commonwealth? Further, once the writer steps outside one jurisdiction, where is he to stop? Professor Fleming's dilemma is clearly shown in his handling of the law in the United States. Occasionally the reader is startled to see an unfamiliar proposition in the text —looking down to the footnote he finds that the only authority cited is the Restatement or perhaps an isolated American decision, and as often as not the reader's hunch is that the House of Lords would reject the particular proposition. On other occasions, generalisations are made in the text which, though proper in an American setting, are equally certainly not an accurate view of English law. Again, propositions are sometimes based on cited American cases when just as many American cases to the contrary could be, but are not, cited. Conversely, it is stated that particular rules are not part of the common law, when in fact they are generally recognised in the United States. Inevitably one asks: "What common law is the author writing about?" Perhaps Professor Fleming will retort that these criticisms are wide of the mark because he is merely writing a textbook from the Australian viewpoint; *i.e.*, examining what the Australian law is and may be, but no more than that—but if this is the fact, he might have been more explicit. These comments are not intended to be adverse; they merely express the doubt whether it is possible both to survey critically from Mount Olympus the whole of the common law of torts and to depict some identifiable system of law as it is.

This discussion must not divert attention from the great merits of the book. The scrutiny of decided cases is close and throws important new light on many of them. The account of Negligence (and particularly Assumption of Risk) is excellent. The style throughout is clear and smooth-flowing.

Considering that there are 762 pages of text, it may fairly be observed that many topics falling within the usually recognised confines of Torts are sketchily dealt with by English standards; *e.g.*, liability of the Crown, passing off and economic torts generally, breach of statutory duty. A large number of "essential cases" in an English text is omitted: *e.g.*, *Bonsor* v. *Musicians' Union*, *Abbott* v. *Sullivan*, *Campbell* v. *Paddington Corporation*. Those two "inevitable" mistakes are there: *Phillips* v. *Barnet*(*t*), and that *De Francesco* v. *Barnum* (1890) 45 Ch.D. 430 is a case on *Lumley* v. *Gye*. All teachers are accustomed to inaccurate versions of *Bourhill* v. *Young* but this is the first time one has found the fishwife on the "*back* of a *bus*." The sections on Damages are most disappointing—the more so as the Preface leads us to hope for much: many important points are omitted, and the references to exemplary damages are especially muddled.

Australian lawyers in particular will be deeply indebted to Professor Fleming for this fine work. Similar books from an Australian standpoint on other branches of the common law would be most valuable.

Harry Street.

Scandinavian Studies in Law 1957. Vol. I. Edited by Folke Schmidt and published under the auspices of the Faculty of Law, Stockholm University. [Stockholm: Almquist & Wiksell. 1957. 198 pp.]

The Scandinavian languages are so little known to the outside world that Scandinavian lawyers have for some time past been in the habit of using English or some other widespread means of communication in order to disseminate their views on such subjects as Jurisprudence or Roman or International Law. But they have naturally used their own languages when writing on their own laws and often enough even when discussing subjects of more general interest. The purpose of the series of which this is the first volume is to present in an English translation such fragments of what may be called this "vernacular" literature as may seem to deserve the attention of lawyers in other countries. The Editorial Board is Swedish, but there is an advisory committee composed of jurists from Sweden, Denmark, Norway, Iceland and Finland.

Of the six articles and extracts here reprinted, two are on Jurisprudence and one on International Law; the other three deal, from the point of view of Swedish law, with problems which arise in similar forms in other countries. All are of peculiar importance not only for their contents but also for the glimpses they afford of legal systems and modes of thought which are still very little known elsewhere. For Scandinavian law belongs to neither the civil law nor the common law world, though it resembles both in many ways. In its loose treatment of the formal sources of law it resembles the civil law rather than the common law systems. For nowhere is there the same strict obedience to precedent and the actual words of enactments as in England; the lawyers and judges seem to find their way about in a world where there is no fixed hierarchy of sources. On the other hand, although it has been influenced by the civil law, Scandinavian law has developed continuously from within and has never had the hard bony structure that is elsewhere provided by received Roman law. One gets the impression, even more than in English law, that law is merely one side of free human activity, in constant flux and curiously unartificial. It is a part of the way in which the Scandinavians do their business. Thus Scandinavian lawyers seem to outsiders remarkably uninhibited, unless it is by an excessive dislike of conceptualism.

This is certainly the flavour of the extracts here printed from Professor Kurt Grönfors's book *Apportionment of Damages in the Swedish Law of Torts* and from Professor Åke Malmström's *Children's Welfare in Family Law*. The former shows a complete knowledge of the problem as it has been tackled in other countries and discusses at length by reference to the case law the difficulties it has given rise to in Sweden. The moral is drawn that apportionment statutes, far from simplifying the assessment of damages, lead to extraordinary complications. Perhaps one might say in criticism that it all depends on the judges. If they treat the statutes as inviting them to use rough-and-ready methods, they may achieve the emancipation from hair-splitting subtleties that they have long desired. All they have to say is that, sitting as juries, they make a certain apportionment and give no reasons. The admirable extract from Professor Malmström's book, which deals mainly with the support of illegitimate children, lets welcome light into a problem of which the author himself says that "It is impossible to model real life in strict accordance with abstract ideals by applying legal rules." A reading of Professor Folke Schmidt's article "Construction of Statutes," must prompt any English lawyer

to say that, however illiberal may be our way of construing statutes, a general adherence to grammatical interpretation does at least save us from the difficulties inherent in a looser method. Swedish difficulties are enhanced by the Swedish tendency to bring all law into statutory form, leaving in principle nothing to be decided in terms of a common law antecedent to statute. In fairly recent times recourse to *travaux préparatoires* has become regular and has reached a subtlety and complication that would be hard to find elsewhere. Somehow or other Swedish judges seem to be able to handle their diverse material in such a way as to do justice without too great a sacrifice of consistency, partly because they know how to conceal the reasons for their decisions until they feel satisfied that they have found the right doctrine. But it is clear that the Swedish world is very peculiar. It has its own form of Parliamentarism, very little influenced by ours or that of any other country, and it applies the principle of the separation of powers in its own way, combining legislative and judicial functions quite differently from elsewhere. To understand this chapter properly one would have to dig very deep into Swedish public life.

It would be fair to say that the other three contributions are not so illuminating as those which have just been mentioned, mainly because they go over ground which has long been worked outside the Scandinavian countries. Perhaps the most accessible is Professor Alf Ross's article "Tū-tū," which has already appeared in the *Harvard Law Review*. The author uses a simple allegory to show that many legal concepts, such as rights, could be dispensed with as unnecessary middle terms in legal reasoning, but are none the less to be retained as means of introducing some general system into the law. This is very much in line with modern methods of legal analysis. Professor Arnholm's "Some Basic Problems of Jurisprudence" is from a review of another of Professor Ross's writings. It is mainly concerned with the definition of *gjeldende rett*, which is consistently translated "valid law," but which would perhaps be more intelligible to English readers if expressed as "the law actually in force at any given time." His problem is really our old one of distinguishing what is law from what ought to be law, and it is peculiarly difficult for a Norwegian jurist because of the lack, already alluded to above, of any strict hierarchy of sources and the greater likelihood there than here of good law becoming bad law and vice versa, without the intervention of an Act of Parliament. The author is rightly dissatisfied with a definition of valid law as something that will actually survive in the future; for he is convinced that a judge, in applying, as he must do, the existing law, is not merely spotting the probable survivor among competing rules. Hence comes the difficulty, which for him is very real, of how it can be said that a dissenting judge is fulfilling his duty to apply the existing law. Nor—and in this he disagrees with Professor Ross—will he have it that the law is merely, or even primarily, a set of directives to judges. It is surely aimed at the ordinary man, and in the best of worlds would be obeyed by him to the extent of giving the judges nothing to do. The article is essentially critical and leads to no conclusion.

Professor Gihl's "The Legal Character and Sources of International Law" goes over old ground. He shows how untenable are all the ordinary explanations of international obligation and comes, if I understand him rightly, to the conclusion that international law is just customary law. "It is impossible to find any 'foundation' for this law, whether in the will of the state or in any 'basic norm,' which gives its rules validity as rules of law. Nor is this necessary. It is sufficient to be able to establish its existence by empirical means." Thus he infers also that the sources of international law are ultimately only one, namely custom, and he ends by saying "As always when it is a matter of determining the content of international customary law, the problem is historical in nature."

To sum up, all these authors are living in an atmosphere which is very natural. They live in a world where law is not imposed from above but in which it is peculiarly difficult to distinguish what is law from what ought to

be law, in which authority, such as it is, is used to formulate the results of enlightened inquiry, and in which a formalised natural law has very little meaning. In other words it is a very "uncontinental" atmosphere but one very like our own without the excess of stubborn technicalities from which we suffer.

F. H. Lawson.

Constitutional Laws of the Commonwealth, Vol. I, The Monarchies. By Sir Ivor Jennings, K.B.E., Q.C., Litt.D., LL.D., F.B.A., Master of Trinity Hall, Cambridge. [Oxford: Clarendon Press. 1957. 496 pp. 50s. net.]

Jennings and Young's *Constitutional Laws of the British Empire*, published in 1938, became *Constitutional Laws of the Commonwealth* in the second edition of 1952. The third edition, appearing properly under Sir Ivor Jennings' sole name, is to be divided into two volumes of which this, the first, covers "the Monarchies." Although telling us little about the structure of Colonial constitutions compared with Wight's *British Colonial Constitutions, 1947*, the work has for twenty years been an indispensable source book for students of the constitutional laws of the former Dominions. The main change in the new edition (apart from the relegation of India and Pakistan, though not the Indian Independence Act, to a separate volume) is the inclusion of reports of the South African *Coloured Voters' Case* and *High Court of Parliament Case*. The commentary has received small alterations here and there, for example, to take account of the accession of Queen Elizabeth II and the royal style and titles in the various Commonwealth countries, to revise the passages on the sovereignty of Parliament and on judicial references to reports of Imperial Conferences, and to note the grant to the Canadian Parliament in 1949 of a limited power of constitutional amendment. The arguments concerning parliamentary sovereignty at pp. 124–125 and 134–135 carry the matter a little further than the previous edition. Thus the statement "Parliament is not a sovereign body" (2nd ed., p. 133) becomes "the law does not say that Parliament is sovereign" (3rd ed., p. 135). But the passages, necessarily brief, do not convince. Apart from *The Prince's Case* there are numerous judicial dicta, and as for writers Dicey was but following Coke, Bacon, Blackstone and many others. How does one "prove" a legal proposition? And is it right to tell students that Parliament could confer sovereignty on itself by its own Act? At least we are spared the argument from *Trethowan's Case*: indeed, Sir Ivor admits at p. 51 that the power of constitutional amendment under section 5 of the Colonial Laws Validity Act "is not of the 'sovereign' kind possessed by the United Kingdom Parliament."

Sir Ivor's gifts are better employed than in the dull mechanics of revising textbooks, but if he had the time he could make the book better than it is, especially in relation to Canada and Australia. The section on the judicial interpretation of the Canadian Constitution (pp. 188 *et seq.*), although it talks of "recent" tendencies, is written as if the Privy Council still interpreted that Constitution, and there is no cross-reference to the abolition of Canadian appeals to the Privy Council which was held valid in a case reported in another part of the book. A second edition of Kennedy's *Constitution of Canada* was published in 1937 (p. 185n.), and "Legislatives" (p. 187) is a misprint surviving from the first edition. The commentary on the Australian Constitution, although it refers to some cases from the First World War, makes no reference to decisions on the defence and external affairs powers during or arising out of the Second World War. Indeed, only two cases decided in the last twenty years are mentioned. The report of one of these—the *Bank Nationalisation Case*—was included in the second edition but it still does not appear in the table of contents. A case referred to at p. 274 as "recent" was reported in 1935. We might have expected some

discussion of *R.* v. *Foster* (1949), *Jehovah's Witnesses* (1949), the *Communist Party* (1951) and *Nelungaloo Pty.* (1951). Section 74 of the Australian Constitution is once more inaccurately set out at p. 269; and in a sentence on p. 261 that has been amended to include the Cocos Islands, Nauru is still said to have been "acquired" by Australia. Chapter 7 is not very enlightening about the constitutional struggle in South Africa, but the report of the *Senate Act Case* was, unfortunately, not available.

There are a few doubtful remarks in the first two chapters, which are concerned largely with Colonies and Protectorates. We are not yet satisfied with the exposition at pp. 40 and 47 of the principle of *Campbell* v. *Hall. Sammut* v. *Strickland* is at last brought in, but we submit that it did not follow *Campbell* v. *Hall* on the point mentioned in the text. British Protected Persons are inadequately dealt with at p. 15, and the statement at pp. 17–18 concerning acts of the Crown in Protectorates is probably too wide. The reader is referred at p. 124n. to the second edition of Keir and Lawson, and p. 132 repeats the misleading statement that the Statute of Westminster repealed the Colonial Laws Validity Act. The Appendix again sets out the first six sections of the British Nationality Act, 1948, without indicating that they do not constitute the whole Act. The provisions relating to British Protected Persons might well have been included, together with extracts from the Order in Council of 1949.

The inclusion in this volume of a chapter on the Republic of Ireland appears at first sight paradoxical, since it is neither a monarchy nor a member of the Commonwealth; but its constitutional position is, of course, anomalous, and the presence of Chapter 9 is justified by convenience. Volume II on the Republics will be eagerly awaited for Sir Ivor's comments on the Constitutions of India and Pakistan. We hope the independent Federation of Malaya will be included, although it is not a Republic (nor a realm of the Queen), for its Constitution would provide a most interesting comparison with the other two.

O. Hood Phillips.

Judicial Review in the English-Speaking World. By Edward McWhinney, Associate Professor of Law in the University of Toronto. [Toronto: University Press. London: O.U.P. 1956. xiv and 201 pp. 68s. net.]

Professor McWhinney has written a short book on a large theme, and he has chosen to direct his fire against a large target. His theme is judicial interpretation of constitutions in the Commonwealth, the Republic of Ireland and the United States. His target is judicial positivism. "The major vice of all the decisions of the Privy Council and of the local courts in constitutional matters," he writes (at pp. 29–30), is "their incurable positivism, which has obscured the process of analysis of the conflicting interests involved in the cases before the courts and thereby prevented any very conscious, intelligent balancing of those interests to arrive at the end decision." In so far as policy considerations have in fact intruded into the process of making decisions, they have entered silently through the back door. The weakness of the positivist attitude is "the failure to recognise that it is not a choice between judicial policy-making and absence of judicial policy-making; but between policy-making based on a full and open canvassing of alternative lines of action and policy-making in the dark." The prevalence of the positivist approach to adjudication is attributed to the narrowness of the professional traditions of the common law and, in particular, to the deficiencies of legal education, which fails to give the lawyer that broad training in the social sciences which is assumed to be necessary for the handling of public law issues.

It is possible to point to a number of cases on the interpretation of the Canadian and Australian Constitutions in which the decisions were almost certainly influenced by judicial views on political, social and economic policy

which were unacknowledged, or only hinted at, in the judgments. One may reasonably object to this excess of diffidence and argue that the judges should be more frank in declaring their positions and that, as in the United States, a wide range of facts that are at present inadmissible as evidence should be admitted and openly scrutinised in constitutional cases. Professor McWhinney is not unaware of the dangers of enlarging the traditional conception of the judicial function, as he shows in his interesting discussion of the competing philosophies of judicial activism and judicial self-restraint in the American Supreme Court. He does not commit himself unequivocally to either philosophy and appears to lean in favour of a more or less pragmatic approach. A plea for overt recognition of the creative role of the judiciary in matters that are the subject of political controversy and legislative prescription raises a host of problems, and it would be unfair to criticise an essayist for suggesting only tentative answers to them. Professor McWhinney writes primarily as a critic of existing methods of interpretation, and it is as a critic that he is to be criticised. His readers must be forgiven if their view of his target is often blurred and if the target sometimes appears to change shape. There are times when it is not clear whether he is attacking "pure" positivism, pseudo-positivism (judicial legislation under the guise of pure positivism) or both simultaneously. His use of the term "positivism" to cover a miscellany of judicial concepts and techniques of which he disapproves does not facilitate identification. And to the extent that he sees the typical judicial approach as entailing the treatment of a constitution as "an ordinary statute, to be construed restrictively and without regard to the policies that the instrument is intended to embody" (see p. 136), he over-simplifies the situation. The rules of statutory interpretation (which one might have expected the author to subject to thorough analysis) do not preclude the courts from considering the policy behind a Constitution Act or any other statute, provided that the policy is discernible without recourse to inadmissible aids. Moreover, application of the cardinal principle of interpretation, the literal rule, does not necessarily lead to a "restrictive" interpretation either of the Constitution Act or of legislation that has been enacted in reliance upon it. A literal interpretation of the distribution of powers under sections 91 and 92 of the British North America Act would probably have supported the validity of a number of enactments by the Canadian Parliament which were in fact held to be unconstitutional. The use of familiar principles of statutory construction in interpreting the Australian Constitution has (with two or three important exceptions) favoured the expansion of Commonwealth powers. It is true that common-law presumptions of legislative intent can be, and have been, invoked to justify the invalidation or narrow interpretation of various enactments impinging on common-law proprietary and contractual rights. But Professor McWhinney exaggerates the vitality of these presumptions. In seeking to establish that in the United Kingdom the judges regard legislation as an intruder upon the preserves of the "ordinary" law he cites only cases decided before 1939; his subsequent discussion of *Liversidge* v. *Anderson* does little to dispel the misconceptions that will have been created in the minds of those readers who are wholly ignorant of the record of the English courts in public law cases since 1939. Here, as elsewhere, one feels that the author has shown a lack of discrimination in his assaults on existing judicial attitudes and, in particular, in his failure sufficiently to emphasise the diversity of the canons of statutory (and constitutional) interpretation to which the courts are entitled to look, and do look, for guidance. Too often one is left wishing that Professor McWhinney would curb his enthusiasm for sweeping generalisations and get down to brass tacks.

The book includes a useful chapter on the Courts and the Constitution in Catholic Ireland, another on the Constitution and Race Relations in the Union of South Africa (in which, however, the great constitutional cases of 1952 are disposed of very perfunctorily), and a chapter on Constitutional Experiments in the Republic of India, Ceylon and Pakistan. The value of the

last-mentioned chapter is questionable. The author frowns on the tendency towards the "mechanico-positivist approach" in the jurisprudence of the Indian Supreme Court; but he considers only two of its decisions. On Ceylon he cites no case at all, although an important decision on the Constitution has already been given by the Privy Council. He deals briefly with the Pakistan constitutional crisis of 1954–1955, but unfortunately he appears to have been unaware of the remarkable decision of the Federal Court given on *Special Reference No. 1 of 1955*—a case which provides more material for an essay on judicial self-restraint than any examined in the book.

S. A. DE SMITH

THE ENGLISH PENAL SYSTEM. By WINIFRED A. ELKIN. [Penguin Books, Ltd., Harmondsworth, Middlesex. 1957. 288 pp. (with index). 3s. 6d. net.]

THIS is the best short account of the English penal system with which I am acquainted. Miss Elkin's papers on penological subjects published in the Howard League's Journal and elsewhere, her excellent book on Juvenile Courts, and her well-known survey (with Rev. Kittermaster) of the Borstal system have already established her position as one of our very few authorities on penological problems, and this volume, short as it is, will undoubtedly enhance her reputation.

After introductory chapters in which she discusses the aim of our modern penal system which has during the present century become increasingly and substantially reformist in character, and the number and types of offenders with which it is called upon to deal, Miss Elkin grapples with the main subject-matter of her book, the methods of treatment which are now available, and in use, for dealing with criminals. These she considers under four heads: those available generally, those available for treating juvenile offenders, those available for habitual offenders, and those available for young adults. Her scheme of arrangement, however, involves her in difficulties which rather upset the balance of her book. It results for one thing in the chapter on the young adult offender being postponed until almost the end (for the whole treatment of the prison system comes in between). The result is that the study of the youthful offender in which Miss Elkin is, as one would expect, at her sympathetic best is broken up into two widely separated parts, and these parts are not halves; for evidently feeling, as she approached her Borstal chapter, that her space was becoming limited, she begins to compress her material, and that chapter, to which one had naturally looked forward with particular interest since a good deal has happened in connection with young adult offenders since her book on Borstal appeared, is somewhat disappointing.

The great value of a short survey of this kind, when it is as well done as this is, is that it enables one to get a general impression of the whole system, to note its growing points, to see where and why the administrators have failed to carry through policies laid down for them by Parliament, and to place the penological problem in its context with those of the other social services.

One of Miss Elkin's most valuable points is her demonstration that the penal system stands too much apart from the welfare State which has been in the building during the present century. Prisons and all that sort of thing got off to a much earlier start, a bad one, in a social context very different from that existing today. No real effort at integration has ever been made, and this is no doubt one of the main reasons why progress on the penal front, real as it has been, has been, on the whole, so halting and disappointing. It is fairly clear from Miss Elkin's pages that one of the sources of difficulty is institutional, arising from the fact that for reasons of history penal administration lies with the Home Office. This department which is directly responsible

for the treatment of juvenile offenders, and indirectly for the whole prison system, since it controls the Prison Commission, has neither experience in education nor in medical psychology, which are the two main roads along which penological progress is being made. Because over the past generation we have been fortunate to have at the Home Office a number of able and enlightened officials handling these problems, advances in certain directions have been made, but Miss Elkin shows how often that department has taken a line of its own on educational and other matters where one would have expected the development of a common policy with the Ministries of Education and Local Government: one need only mention as illustration the positions of probation officers and children's officers which are hardly tied up at all, though in practice a close liaison is sometimes found to exist between them.

But it must be confessed that there is no public enthusiasm at present for integrating the penal system into the welfare State. The ordinary citizen remains intensely suspicious of the criminal and grudges every penny spent on the prison and other penal services. Again and again Miss Elkin shows how excellent proposals have been held up or come to nothing for want of a little money. Every other kind of building has to have precedence of new prisons, though most of those now in use are over a hundred years old, and some go back to the Napoleonic Wars. On the other hand the probation service does seem to be capturing public respect so that money is more readily available for it.

Although the title of the book under review is *The English Penal System*, and in discussing it I have frequently used the word "system," there is of course no real "system" in existence. This is one of the most valuable points brought out by Miss Elkin. Whatever the position under the 1877 Act as administered by du Cane and his first Prison Commission, ever since the report of the Gladstone Committee of 1895 we have been feeling our way with a series of experimental measures some of which have been admirably successful like the Probation Service, on which Miss Elkin gives an understanding report, and others have failed or been only partially successful, such as the treatment of the long-term recidivist.

Miss Elkin's book suggests that future progress is most likely to be achieved in this empirical and typically English manner. Nothing could be more instructive—and indeed encouraging—than the growth of the open prison over the last ten years or so. This resulted from the impact of war conditions upon an experiment which was being carried on at Wakefield Prison: of this the Prison Commission were fortunately quick to grasp the significance. One has the feeling, however, that most of these developments have been improvisations from accidental discoveries rather than the result of a planned programme. Indeed without the research which so far has been only sporadically provided within very limited fields of penological study by such organisations as the Institute for the Study and Treatment of Delinquency it is difficult to see how any really scientifically based policy of penological development could have been put into effect. The Home Office some years ago included what could only be regarded as a token amount for research in its estimates, but this encouraging gesture has hardly been followed up, though the present Home Secretary has recently given indications of an intention to treat research seriously.

It is to be hoped that Miss Elkin will produce a further edition of her book before long. Although published in 1957 the material discussed is seldom later than 1954. By that year sufficient progress had not been made with some of the more important innovations of the Criminal Justice Act, 1948, to enable even a tentative estimate of their value to be formed, witness the arrangements for corrective training, and others, such as the remand centres, still wanted administrative implementation. The position was, and remains, somewhat fluid, so that any account which attempts to do more than describe

the mere machinery—and one of the valuable features of Miss Elkin's book is that she continually essays estimates of its working—must of necessity be exceedingly tentative. There is need that surveys should be carried out regularly and at fairly frequent intervals. We could do already with another edition of Sir Lionel Fox's admirable book on our prisons of which Miss Elkin naturally makes a good deal of use.

C. C. Rider

THE ELEMENTS OF INCOME TAX LAW. By C. N. BEATTIE, LL.B., of Lincoln's Inn, Barrister-at-Law. Third Edition. [London: Stevens & Sons, Ltd. 1957. 223 pp. 27s. 6d. net.]

THOSE who have the second edition of Mr. Beattie's book will require no recommendation to buy the third edition. The case law alone which has been produced by the four years that have elapsed since publication of the second edition would be sufficient justification: moreover, there are now sections on Pension Schemes, Overseas Trade Corporations and Double Taxation, which did not appear in the former edition.

"The book," says the author in his Preface, "is written for law students." This is certainly true, in that it deals with income tax law and not with accountancy, and gives few examples worked out with figures. The present writer questions whether this is altogether wise, as it tends to encourage the law student to believe, as many lawyers are prone to do anyhow, that arithmetic is a science or mystery of which he cannot claim to have any knowledge. Apart from this possible defect, however, the book is ideally suited for the student: it is lucid and readable, and its style is elegant; it is content to state the law as it is, without promenading the author's pet theories concerning the law as it ought to be; it tends to make the rules appear a little simpler than they in fact are; it does not reproduce lengthy extracts from the Income Tax Act, 1952, in full, but digests them; it is easily portable; and it costs only 27s. 6d. The objection may be made that it does not encourage the student to adopt a critical approach to the law. This is true, but the explanation surely is that, by the time the student starts on income tax law, he should already be equipped with a critical approach: if he is not, he cannot learn to develop it in respect of income tax until after he has assimilated a very great number of rules of law.

In the opinion of the reviewer this book is also to be recommended to practitioners. It is not enough in itself, but any solicitor who has this book and an annotated volume of the Income Tax Act, 1952, and the subsequent Finance Acts, should be able to ascertain in almost every case what is the exact rule of law of whose existence he has no knowledge beyond mere suspicion. If there exists any solicitor whose knowledge of income tax is so hazy that he does not even suspect the existence of the major rules, he would do well to buy this book and read it from cover to cover.

D. C. POTTER.

ODGERS' PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE. By BASIL ANTONY HARWOOD. Sixteenth Edition. [London: Stevens & Sons, Ltd. 1957. xxxvii, 401 and (appendices) 109 (index) pp. 21. £2 10s. net.]

IF the "White Book" may be regarded as the "Bradshaw" of the traveller in the law in the realm of procedure, Odgers on *Pleading and Practice* may well be regarded as the "Baedeker" guide not only to explain the "how" but also the "why and wherefore" of the intricacies of practice in the major spheres of civil litigation. It has never lost its position as the textbook *par*

excellence since it first appeared from the pen of its original author, the late William Blake Odgers, well known for many years as the author of a textbook on the *Law of Libel and Slander*, the first Director of Legal Studies of the Council of Legal Education and a greatly esteemed Master of the Bench of the Middle Temple. The present edition has appeared within two years of its predecessor and under the hand of the same editor of that edition, Master B. A. Harwood.

New rules and decisions have called for this latest issue and have afforded the learned editor the opportunity for such general revision as has been thought desirable. Originally the book was limited to the practice of the Queen's Bench Division of the High Court, but more recently it has been extended to include a couple of chapters dealing more particularly with the Chancery Division, running to some twenty-seven pages, which come from the pen of Mr. Raymond Walton, of Lincoln's Inn, who was the first to contribute this desirable accession to the range of the book. These chapters afford a brief but admirable conspectus of the methods of Chancery litigation, using the latter term in its broadest sense.

An outstanding characteristic of Odgers on *Pleading and Practice* has been from the very first its readableness, no easy task for an author to accomplish in a sphere which does not immediately suggest itself as susceptible thereto, and when it first appeared in 1891 this was the more remarkable, as, generally speaking, readableness was not an omnipresent feature of the then current textbooks. For the size of the work it is astonishingly comprehensive and well documented, not merely by the citation of authorities but also by the praiseworthy practice of providing pithy statements of the salient principles laid down or enunciated by the cases, as well as the gist of valuable judicial dicta presented by way of illustration. Some seventy-six pages are devoted to examples of pleadings. Of statements of claim, over thirty are devoted to proceedings in the Queen's Bench and only two to the Chancery Division, and there are no defences which seem particularly designated as specifically associated with the latter Division, although more than one might well relate to proceedings which could be taken therein. It would seem to be an advantage if in a future edition the related pleadings were grouped together so that where a defence or later pleading has reference to a particular statement of claim the reader at a glance could have the set of pleadings in the action before him. Specimens of other forms for the initiation of Chancery proceedings might usefully be added.

There appears to have been an oversight at p. 490 at Precedent 95 where reference is made to a memorandum sufficient to satisfy the Statute of Frauds. This clearly should have referred to the Law of Property Act, 1925, which in this behalf replaced the Statute of Frauds; nevertheless the reputation of the book for reliability is well maintained.

Notwithstanding the scope of subject-matter dealt with, the book remains of convenient size, a great merit in a work which has always proved to be a constant companion in the study and practice of litigation.

Bertram B. Benas.

Annual Survey of South African Law—1955. By the Faculty of Law of the University of the Witwatersrand. [Cape Town: Juta & Co., Ltd. 1956. 45s. net.]

The first volume of this excellent publication in 1947 covered 150 pages, the one under review 353 and the 1956 volume, which has since appeared, 450. A tendency to swell the contents can hardly be avoided but the stage has now been reached at which few people will read the *Survey* from cover to cover, but many will consult the sections in which they are specially interested. When the general standard is so high it is invidious to do more than mention the

outstanding contributions. I found Professor Ellison Kahn's account of the Government's efforts to secure the separate representation of coloured voters cool and extremely lucid, and greatly admired the way in which Mr. Millner made an interesting narrative of the unpromising section on "Miscellaneous Legislation and Cases." The citation from Broome J.P. on p. 331 should read "The primary function of the court is to decide justiciable issues" not "justifiable issues."

A. M. HONORÉ.

BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW. No. 4, American-German Private International Law [American-German Private Law Relations 1945–1955]. New York. By MARTIN DOMKE. 1956. 144 pp. including Table and Indices. No. 6, American-Greek Private International Law, New York, 1957. By ALBERT A. EHRENZWEIG, CHARALAMBOS FRAGISTAS and ANTHANASSIOS YIANNOPOULOS, 111 pp. including Tables and Indices. No. 7, American-Danish Private International Law, New York, 1957. By ALLAN PHILIP, 79 pp. including Index. [New York: Oceana Publications.]

THE Parker School of Foreign and Comparative Law of Columbia University and the editors, Professors Nussbaum and Reese, are to be congratulated upon boldly breaking new ground with this series. The authors are acknowledged experts in their respective fields and have contributed valuable manuals.

One of the difficulties which face counsel in advising in conflict cases is the fact that sooner or later he must advise his client that the issue depends on a question of foreign law which must be proved. These works will not enable counsel to advise on foreign law but they will enable him to know what attitude to adopt in approaching the foreign lawyer for advice. This is *comparative* private international law in a most practical fashion and fully documented with references to cases and legislation. What, however, is most important is the fact that the authors have had the good sense and originality to include in their work the relevant bilateral treaties affecting private international law—the 1954 Treaty of Friendship Commerce and Navigation between the U.S.A. and the Federal Republic of Germany, the 1957 Treaty of the same style between the U.S.A. and Greece, and the treaties of 1826 and 1951 between the U.S.A. and Denmark. The treatment of nationals, companies, property and vessels, especially the most-favoured-nation clauses, are part of the law of the land in the U.S.A. when part of a self-executing treaty and thus public international law agreements form an important part of the private international law of that country as it does of others, a fact which in the past has too often been neglected. We sincerely wish this series the success it most certainly deserves.

B. A. WORTLEY

Books and Publications received:—

CHITTY ON CONTRACTS. Vol. 1. General Principles. Third Cumulative Supplement to the 21st Ed. Vol. 2. Specific Contracts. Third Cumulative Supplement to the 21st Ed. (To September 1, 1957.) By F. MAURICE DRAKE, M.A. Supplement to Vols. 1 and 2 together at 6s. 6d. net. [London: Sweet & Maxwell, Ltd.]

Clerk & Lindsell on Torts. Third Cumulative Supplement to the Eleventh Ed. (To September 1, 1957.) By F. Maurice Drake, M.A. 6s. 6d. net. [London: Sweet & Maxwell, Ltd.]

Netherlands Legal Provisions on Companies Limited by Shares. [Leiden: A. W. Sijthoff. 1957. 29 pp.]

Journal of the Commission of Jurists. Vol. I, No. 1. Autumn 1957. 150 pp. 47, Buitenhof, The Hague, Netherlands.

Saturn. Monthly Review. Vol. III, No. 4. August-September, 1957. 129 pp. International Commission Against Concentration Camp Practices. 5 rue Daunon, Paris, 2e.

Legislation of Poland. Safety and Hygiene at Work. Polish Institute of International Affairs. 145 pp.

Abolish the Blasphemy Laws. By Robert S. W. Pollard. [The Society for the Abolition of the Blasphemy Laws. 40 Drury Lane, London, W.C.2. 15 pp. 6d.]

United Nations. Repertory of Practice of United Nations Organs. Table of Contents and Subject of Index to Volumes I–V. 316 pp. New York. 1957. 22s. 6d. H.M. Stationery Office.

The Lawyer's Companion and Diary. 1958. Editors: W. H. Redman and Leslie C. E. Turner. 2159 pp. [London: Stevens & Sons, Ltd. £1 7s. 6d.]

The Draft Code of Offences against the Peace and Security of Mankind and the Draft Statute for an International Criminal Court. Memorandum submitted to the General Assembly of the United Nations by the Institute of Jewish Affairs. World Jewish Congress. 15 East 84th Street, New York 28, N.Y.

Charlesworth on Negligence. First Supplement to the Third Edition. (To September 1, 1957.) [London: Sweet & Maxwell, Ltd. 6s. 6d. net.]

Yearbook of the International Law Commission, 1957. Vol. I. 232 pp. United Nations.

Dymond's Death Duties. Twelfth Edition. Second (Cumulative) Supplement (to August 31, 1957). By Robert Dymond and Reginald K. Johns. xv and 122 pp. [London: The Solicitors' Law Stationery Society, Ltd. 15s. net.]

The American Journal of Legal History. Vol. 1, Nos. 1 to 3. Published by Temple University School of Law. 1715 North Broad Street, Philadelphia 22, Pa. $7.50 per year.

Newport and Plunkett: Income Tax, Law and Practice. Twenty-seventh Edition. Supplement to August 1, 1957. [London: Sweet & Maxwell. 3s. 6d. net.]

The Future of Legal Aid. By Peter Benenson. Fabian Research Series. 35 pp. [Fabian Society, 11 Dartmouth St., S.W.1. 3s.]

International Political Science Abstracts. Vol. VII, No. 2. 1957. Abstracts of Articles published from January to March, 1957. 324 pp. [Oxford: Basil Blackwell. 12s. net.]

The Hungarian Situation and the Rule of Law. International Commission of Jurists. The Hague. 1957. 144 pp.